TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 265

CLYDE-MALLORY LINES, PETITIONER,

vs.

STEAMSHIP "EGLANTINE" AND THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 29, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1942.

[fols. 1-3] [Captions omitted]

[fol. 4] **IN UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION, IN ADMIRALTY**

No. —

CLYDE-MALLORY LINES

vs.

STEAMSHIP "EGLANTINE"

LIBEL—Filed June 10, 1937

To the Honorable the Judge of the United States District Court in and for the Eastern District of Louisiana, New Orleans Division, in Admiralty:

The libel and complaint of Clyde-Mallory Lines, Owner of the Steamship "BRAZOS", against the Steamship "EGLANTINE", her engines, boilers, tackle, apparel, equipment and furniture, in a cause of collision, civil and maritime, articulately propounds and alleges, upon information and belief, as follows:

I

That at all times hereinafter mentioned libellant, Clyde-Mallory Lines, was, and now is, a Corporation organized under the laws of the State of Maine, and was, at the time of the collision hereinafter set forth, owner of the Steamship "BRAZOS", which at the time of and until said collision was tight, staunch, strong and in all respects seaworthy.

II

That the Steamship "EGLANTINE" now is, or during the currency of process herein will be, within the jurisdiction of the United States and of this Honorable Court.

[fol. 5] III

That on December 21, 1932, at the time of the collision hereinafter set forth, the Steamship "EGLANTINE" was owned by the United States of America and was being operated as a merchant vessel of the United States.

IV

That since December 21, 1932, and since the collision hereinafter set forth the Steamship "EGLANTINE" has been sold by the United States of America, and is now owned by Lykes Bros.-Ripley Steamship Co., Inc., a corporation organized under the laws of the State of Louisiana.

V

That in the afternoon of December 21, 1932, the Steamship "BRAZOS" sailed with cargo from Galveston on a voyage to New York by way of Key West and Miami. She was under the command of a competent and experienced master and was manned by competent and experienced officers and crew. The weather was clear, wind light variable, tide ebb. After passing Buoy No. 9, the "BRAZOS" encountered light, patchy fog and slowed down, sounding fog signals as required by law. The master was on the bridge in charge of navigation, the chief officer was also on the bridge, and the third officer was at the wheel. The second officer and two seamen were in the eyes of the ship keeping a careful lookout. The boatswain was standing by the anchor. After passing Buoy No. 3 and while proceeding cautiously, sounding fog signals at short intervals and keeping a sharp lookout, suddenly a steamship, which proved to be the Steamship "EGLANTINE", loomed out of the fog dead ahead lying across the channel. The engines of the "BRAZOS" were immediately put full speed astern, the starboard anchor dropped and the helm put hard aport. The way of the "Brazos" was almost killed, but her stem struck the Steamship "EGLANTINE" on [fol. 6] the port side in the way of No. 2 hold, damaging both vessels. It was ascertained by wireless that the "EGLANTINE" needed no assistance from the "BRAZOS". After an examination showed that the "BRAZOS" was making no water, she proceeded on her voyage. The collision occurred in the channel between 5:30 P. M. and 6 P. M., "BRAZOS" time. No fog signals were heard from the "EGLANTINE" before she came in sight, and the "EGLANTINE" failed to sound any alarm or danger signal.

VI

That on or about December 28, 1932, the libellant herein, as owner of the Steamship "BRAZOS", filed in the United

States District Court for the Southern District of New York, its petition claiming the benefit of the limitation of liability provided in Sections 4282, 4283, 4284, 4285 and 4286, of the Revised Statutes of the United States, and the various statutes supplementary thereto and amendatory thereof, in respect of the aforesaid collision: Thereafter the United States of America appeared in said proceeding, as owner of the Steamship "EGLANTINE", and filed its claim and its answer to the aforesaid petition.

VII

That on or about the 16th. day of February, 1937, said proceeding duly came on for trial and was tried in the United States District Court for the Southern District of New York, and thereafter said Court held and decided that the Steamship "EGLANTINE" and the Steamship "BRAZOS" were both to blame for the aforesaid collision.

VIII

That by reason of the aforesaid collision, Libellant herein sustained damages in the sum of about Forty Thousand Dollars ($40,000.00). By reason of the aforesaid collision the Steamship "EGLANTINE" sustained damages in the sum of about Twenty Thousand Dollars ($20,000.00), as nearly as can now be ascertained.

[fol. 7]

IX

That by virtue of its faults contributing to the aforesaid collision, and the aforesaid decision and decree of the United States District Court for the Southern District of New York, the Steamship "EGLANTINE" is liable to the Libellant herein for one-half (½) the difference between the damages sustained by the Libellants herein by reason of the aforesaid collision and the damages sustained by the Steamship "EGLANTINE" by reason of the aforesaid collision, which sum amounts to about Ten thousand dollars ($10,000.00), as nearly as can now be ascertained, no part of which has been paid, although payment thereof has been duly demanded.

X

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, Libellant prays that process in due form of law according to the course and practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the Steamship "EGLANTINE", her engines, boilers, tackle, apparel, equipment and furniture, and that all persons having or claiming to have any right, title or interest in and to said Steamship "EGLANTINE", her engines, boilers, tackle, apparel, equipment and furniture, may be cited to appear and to answer under oath all and singular the matters set forth herein and that this Honorable Court may be pleased to decree payment to Libellant, Clyde-Mallory Lines, the amount of its damages as aforesaid, together with interest and costs, and that the said Steamship "EGLANTINE", her engines, boilers, tackle, apparel, equipment and furniture, may be condemned and sold to pay and satisfy the damages and claims aforesaid [fol. 8] with interest and costs, and that Libellant may have such other and further relief as in law and justice it may be entitled to receive.

Burlingham, Vedder, Clark & Hupper; Dengre, Leovy & Chaffe, Proctors for Libellant.

Duly sworn to by Jas. Hy. Bruns. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

ORDER FOR PROCESS—June 10, 1937

Let Admiralty process issue as prayed for.
New Orleans, La., June 10, 1937.
H. J. Carter, Clerk, by H. W. Niehues, Dep. Clerk.

IN UNITED STATES DISTRICT COURT

ADMIRALTY WARRANT AND MARSHAL'S RETURN

The President of the United States of America to the Marshal of the Eastern District of Louisiana or to his lawful Deputy, Greeting:

You Are Hereby Commanded to seize, and into your possession take, the Steamship "EGLANTINE", her engines, boilers, tackle, apparel, equipment and furniture now libeled by CLYDE-MALLORY LINES for the cause set forth in the Libel now pending in the District Court of the

United States for the Eastern District of Louisiana (New Orleans Division), that you do cite and admonish the owner, or owners, and all and every other person, or persons, having, or pretending to have, any right, title, or interest in or to the same, to be and appear before a District Court of the United States for the District aforesaid, to be holden at the City of New Orleans, on the 5th day of July, A. D. 1937, to show cause, if any they have or can, why the steamship "EGLANTINE", her engines, boilers, tackle, apparel, equipment and furniture should not be condemned and sold agreeably to the prayer of Libellant; and how you have executed this warrant that you make return according to law.

Witness, the Honorable Wayne G. Borah, Judge of said Court, at New Orleans, this 10th day of June, 1937, and the [fol. 10] 161st year of the Independence of the United States.

H. J. Carter, Clerk, by H. W. Niehues, Deputy Clerk.

RETURN

No. 289 (Admiralty)

Received this writ at New Orleans, La. on the 10th day of June, 1937, and on the same day, month and year at the hour of 12:30 o'clock p. m., I executed the within admiralty warrant by seizing and taking into my custody the within-named Steamship "Eglantine", her engines, boilers, tackle, apparel, equipment and furniture, as she lay in the Mississippi River at Gretna, La., and served a copy hereof on C. E. Briggs, Chief Mate, on board and in charge of said vessel at the time of seizure.

Hardy C. Richardson, U. S. Marshal, by A. A. Schexnayder, Deputy.

[fol. 11] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION ON BEHALF OF UNITED STATES OF AMERICA—Filed June 10, 1937

To the Honorable Wayne G. Borah, Judge of the District Court of the United States for the Eastern District of Louisiana:

Come Now, Rene A. Viosca, United States Attorney for the Eastern District of Louisiana, and Lucian Y. Ray,

Special Attorney in Admiralty, representing in this behalf the interest of the United States of America, and suggest to the Court:

I

That this is an action in rem against the Steamship EGLANTINE, her engines, boilers, tackle, apparel, etc., which vessel at the time of the alleged damage, to-wit, December 21st, 1932, was owned and operated by or for the United States.

II

That on June 10th, 1937, the said Steamship EGLANTINE was seized under a warrant of seizure issued out of this Honorable Court and is now being held under such warrant.

[fol. 12]

III

That Libellant claims its cause of action arose against the Steamship EGLANTINE while that vessel was owned and operated by or for the United States of America, and that on December 21st, 1932, the said Steamship EGLANTINE was improperly at anchor in the approach to Galveston Harbor, and came into collision with the Steamship BRAZOS, owned by Libellant, causing damage to the latter vessel.

Now, Therefore, in view of the premises, the United States Attorney for the Eastern District of Louisiana, states to the Court:

That the United States of America is a party at interest in said action; that said action is a claim against the United States of America; that the United States desires the release of the Steamship EGLANTINE and assumes the liability for the satisfaction of any decree which may be obtained in said cause, generally reserving to itself the benefit of all exemptions and defenses, and of all limitations of liability accorded by law to the owner of such vessel, including the benefit of limitation as set forth in Section 5 of the Act Approved March 9th, 1920 (41 Stat. 526, c. 95, sec. 5; 46 U. S. Code Sec. 745), as amended June 30th, 1932; and specially reserving the right to object to this Honorable Court entertaining jurisdiction of the subject-matter, viz:

the assertion of alleged lien liability against the Steamship EGLANTINE for cause stated in said libel.

Wherefore, the said Rene A. Viosca, United States Attorney for the Eastern District of Louisiana, prays that the said Steamship EGLANTINE be discharged and released in accordance with Section 4 of the Act of Congress approved March 4th, 1900.

(Sgd.) Rene A. Viosca, United States Attorney. (Sgd.) Lucian Y. Ray, Special Attorney in Ad-
[fol. 13] miralty. (Sgd.) William I. Connelly, Admiralty Attorney, U. S. Maritime Commission, of Counsel.

New Orleans, Louisiana, June 10th, 1937.

IN UNITED STATES DISTRICT COURT

ORDER OF RELEASE—June 10, 1937

It appearing to the Court upon the suggestion of Rene A. Viosca, United States Attorney for the Eastern District of Louisiana, who appears herein for the United States of America, that the said United States is a party at interest in the above numbered and entitled cause, and that a libel has been filed against the Steamship EGLANTINE by reason of a claim arising against said vessel at a time when it was owned and operated by or for the United States of America;

And it further appearing that the United States has set up its interest and asked that the Steamship EGLANTINE be released from the warrant of seizure under which it is now held; and that the United States has assumed all liability for the satisfaction of any decree which may be obtained in said cause, subject to all general and special defenses provided by law:

Now, Therefore, it is Ordered that the Steamship EGLANTINE be discharged and released from the warrant of seizure which it is now held in this cause, and that no bond be required.

It is further Ordered that the United States Marshal be furnished with a copy of this order.

(S.) Rufus E. Foster, United States Circuit Judge.

New Orleans, Louisiana. June 10th, 1937.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTION ON BEHALF OF UNITED STATES—Filed June 14, 1937

To the Honorable Wayne G. Borah, Judge of the United States District Court for the Eastern District of Louisiana:

Comes now the United States of America, Respondent herein, and excepts to the libel filed herein, for that, to-wit:

The libel, on its face, indicates that it was not filed in compliance with the provisions of Section 5 of the Suits in Admiralty Act (March 9th, 1920, c. 95, Sec. 5, 41 Stat. 526; 46 U. S. Code, Sec. 745, as amended).

Wherefore, Respondent prays that the libel herein may be dismissed at Libellant's cost.

Lucian Y. Ray, Special Assistant in Admiralty to the United States Attorney, William J. Connelly, Attorney, U. S. Maritime Commission, Proctors for Respondent.

New Orleans, Louisiana. June 14th, 1937.

[fol. 15] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF ARGUMENT ON EXCEPTION—January 19, 1938

New Orleans, Wednesday, January 19th, 1938.

Court met pursuant to adjournment;
Present: Hon. Wayne G. Borah, Judge.

Hearing on Exceptions

[Number and title omitted]

The exceptions filed on behalf of the respondent herein, came on this day to be heard:

Present: William I. Connelly, Esq., Proctor for the Respondent, exceptor:

James H. Bruns, Esq., Proctor for the Libellant;
and was argued by proctors for the respective parties and submitted, when the Court took time to consider.

* * * * * * * *

[fol. 16] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING EXCEPTION—May 16, 1938

The exception of the respondent herein, having come on at a former day to be heard, and after argument of proctors for the respective parties, was submitted and the Court took time to consider,

Whereupon, and on due consideration thereof, It is Ordered that the exception herein be and the same is hereby overruled.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed June 15, 1938

[fol. 17] Now comes the United States of America, Intervening Claimant herein, specially and specifically reserving all rights which appear in its Petition of Intervention, filed herein June 10th, 1937, together with reservation of its rights as asserted by the Exception to the Libel, filed herein June 14th, 1937, and with such express reservations, now for Answer to the Libel respectfully shows:

I

Intervening Claimant has no knowledge or information sufficient to form a belief as to the allegations of Article I. of the Libel, and, therefore, denies same. Intervening Claimant especially denies that the Steamship BRAZOS was at the times mentioned in the Libel in all respects seaworthy.

II

The allegations of Article II of the Libel are admitted.

III

The allegations of Article III of the Libel are admitted.

IV

The allegations of Article IV of the Libel are admitted.

V

For answer to Article V of the Libel, Intervening Claimant admits that in the afternoon of December 21st, 1932, the Steamship BRAZOS sailed with cargo from Galveston on a voyage to New York by way of Key West and Miami; [fol. 18] there was a light variable wind and an ebb tide, at sometime after departure from the dock at Galveston, the BRAZOS encountered fog and sounded fog signals are required by law; the Master, Chief Officer and Third Officer were on the bridge, and the Second Officer and other seamen were forward to act as lookout. The boatswain was standing by the anchor. After passing Buoy No. 3, sounding fog signals at short intervals, a steamship which proved to be the EGLANTINE, loomed out of the fog dead ahead; the engines of the BRAZOS were immediately put full speed astern, the starboard anchor was dropped and the helm put hard aport, but the stem of the BRAZOS struck the Steamship EGLANTINE on the port side in the way of No. 2 Hold, damaging both vessels. It was ascertained by wireless that the EGLANTINE needed no assistance from the BRAZOS and after examination showed that the BRAZOS was making no way, she proceeded on her voyage. The collision occurred between 5:30 p. m. and 6:00 P. M., BRAZOS time. All remaining allegations contained in Article V of the Libel are denied.

Further answering, Intervening Claimant shows that in the afternoon of December 21st, 1932, the Steamship EGLANTINE, inbound with cargo, was lying at anchor off the entrance to Galveston Harbor awaiting a pilot. In that place and position, there remained and was adequate searoom and water for other vessels to safely pass outward to sea by the observation of routine regulations and proper, safe, precautionary measures. The weather was foggy, light, easterly wind, tide ebb, sea smooth. The EGLAN-

TINE was fully manned, equipped and supplied and in all respects seaworthy. A proper and competent watch was maintained and, prior to the collision hereinafter described, she was displaying regulation anchor lights which were burning brightly. Fog signals prescribed by law for a vessel at anchor were being sounded. While the EGLANTINE was lying so moored, fog signals from a vessel under way, which later proved to be the BRAZOS, were heard approach- [fol. 19] ing from the direction of Galveston, on the port side. Shortly thereafter the BRAZOS came out of the fog at a high and dangerous rate of speed and although there was adequate sea-room and maneuvering area in the vicinity, which could and should have been utilized by the BRAZOS, the navigators of the BRAZOS failed to sufficiently change her course and she collided with the port side of the EGLANTINE, tearing a hole in the EGLANTINE'S port side abreast of #2 Hatch and causing serious damage to her hull and the cargo laden on board.

VI

The allegations of Article VI of the Libel are admitted.

VII

The allegations of Article VII of the Libel are admitted.

VIII

Answering Article VIII of the Libel, Intervening Claimant admits the S. S. EGLANTINE sustained damages as a result of said collision, but for want of sufficient knowledge or information sufficient to form a belief, the remaining allegations of Article VIII of the Libel are denied.

IX

For answer to Article IX of the Libel, Intervening Claimant admits that under an interlocutory decree of the United States District Court for the Southern District of New York, the Steamship EGLANTINE has been held equally to blame with the S. S. BRAZOS, owned by Libellant, for said collision; the remaining allegations of Article IX are denied, and Libellant is put to strict proof thereof.

[fol. 20]

X

The allegations of Article X of the Libel are denied; Intervening Claimant shows the full truth is to be found herein.

XI

For further answer and as a separate and special defense, Intervening Claimant shows that at the time the cause of action stated in the Libel accrued, the Steamship EGLANTINE was owned by the United States of America and was operated as a merchant vessel of the United States; that the present Libel is essentially a claim against the United States of America for a cause of action arising out of the operation of its merchant marine, and any liability for the satisfaction of a decree which may be obtained in this cause has been assumed by the United States of America, with a general reservation of the benefit of all exemptions and defenses of all limitations of liability accorded by law, including the benefit of limitations as specifically set forth in Section 5 of the Act approved March 9th, 1920 (41 Stat. 526, c. 95, section 5; 46 United States Code, Section 745); as amended June 30th, 1932. Intervening Claimant shows that the cause of action stated in the Libel arose more than two years before commencement of this proceeding and is, therefore, barred.

XII

For further answer, and as a separate and special defense, Intervening Claimant avers that Libellant may not attempt to impose lien liability upon the S. S. EGLANTINE while now owned by Lykes Bros.-Ripley Steamship Company for any incident which occurred while said vessel was owned and operated for and by the United States.

[fol. 21]

XIII

For further answer, and as a separate and special defense, Intervening Claimant avers that Libellant may not attempt to impose lien liability upon the S. S. EGLANTINE while now owned by Lykes Bros.-Ropley Steamship Company because of any event which occurred during the period of ownership by the United States, and more than two years prior to the institution of legal proceedings.

XIV

For further answer, and as a separate and special defense, Intervening Claimant shows that if there had, at any time, been any claim or demand against the S. S. EGLANTINE or against its owner by reason of the incidents alleged the Libel, which Intervening Claimant denies, then said claim is barred by the lapse of time and the negligence of the Libellant to have a settlement of the same; and Intervening Claimant, therefore, pleads that any such claim, if any there be, or was, is barred and cannot now be collected because such Libellant has allowed this claim to sleep until after ownership of the property was transferred from the United States of America into the innocent hands of Lykes Bros.-Ripley Steamship Co., Inc.

IV

For further answer, and as a separate and special defense, Intervening Claimant shows that Libellant, with full knowledge of all the facts, did not commence any proceeding to recover from the S. S. EGLANTINE or the owner at the time said cause of action accrued, the United States of America, until the institution of these proceedings and Intervening Claimant, therefore, alleges that Libellant has been guilty of laches and that its failure to prosecute an action prior to June 10th, 1937, has been such laches as should and does bar this action in a court of admiralty.

[fol. 22] Wherefore, Intervening Claimant prays that the Libel herein may be dismissed with costs against Libellant, and for such other and further relief to which in law Intervening Claimant may be entitled and this Court competent to grant.

Rene A. Viosca, United States Attorney; L. V. Cooley, Jr., Assistant United States Attorney; W. J. Connelly, Attorney, U. S. Maritime Commission, Proctors for Intervening Claimant.

New Orleans, Louisiana, July 13, 1938.

Duly sworn to by W. J. Connelly. Jurat omitted in printing.

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER RE ANSWER AND INTERROGATORIES—July 15, 1938

Let the above and foregoing Answer be filed, and Libellant file its answers to the Interrogatories which have been propounded by Respondent, under oath, within thirty (30) days from date of service hereof.

Wayne G. Borah, United States District Judge.

New Orleans, Louisiana, July 15th, 1938.

IN UNITED STATES DISTRICT COURT

INTERROGATORIES PROPOSED BY RESPONDENT TO BE ANSWERED, UNDER OATH, BY LIBELLANT

1. Submit a detailed, itemized statement of the damages as claimed in the Libel, and Show the exact method used in arriving at the total amount claimed.

2. Is it not a fact that the Libel herein undertake to impose lien liability upon the S. S. EGLANTINE for the collision which occurred December 31st, 1932, off Galveston, Texas, while the S. S. EGLANTINE was owned and operated by and for the United States of America through the United States Shipping Board Merchant Fleet Corporation and Lykes Bros.-Ripley Steamship Co., Inc.?

3. Is it not a fact that the Libel herein is the first pleading of any kind ever filed in a proceeding in any court of the United States by Clyde-Mallory Lines, or the S. S. BRAZOS, seeking to recover from the United States or the S. S. EGLANTINE, damages alleged to have been sustained by the S. S. BRAZOS as a result of collision with the S. S. EGLANTINE at the time and place stated in this Libel?

[fol. 24] 4. Is it not a fact that the Libel herein represents the first attempt on behalf of the S. S. BRAZOS and/or its interests, to affirmatively recover from the United States of America and/or the S. S. EGLANTINE for damages alleged to have been sustained by the S. S. BRAZOS as a result of collision with the S. S. EGLANTINE at the time and place stated in this Libel?

5. Explain any answer you may make to Interrogatories 3 and 4 if you deny the facts therein stated to be true, and

(a) Annex an exemplified copy of the initial pleadings filed;

(b) Describe the progress of the case, stating the substance of all pleadings filed;

(c) State what disposition was made of the case.

IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTION AND ANSWER OF CLYDE-MALLORY LINES TO INTERROGATORIES—Filed August 12, 1938

Now into Court comes Clyde-Mallory Lines, Owner of the Steamship "BRAZOS", Libellant herein, and for exception and answer to the Interrogatories propounded herein by the United States of America, Claimant herein, with its Answer, alleges and denies under oath as follows:

1. Libellant, through its Proctors in New York, who represent Libellant in the litigation at New York, referred [fol. 25] to in Articles VI and VII of the Libel, (all of the allegations of which Articles are admitted in the Answer herein of Claimant, United States of America) has submitted to the United States Attorney in New York, who represents Claimant in the said litigation in New York, a detailed itemized statement of the damages alleged to have been sustained by the Libellant as a result of the collision set forth in the Libel and Libellant, through its said Proctors in New York has received from said United States Attorney in New York a detailed itemized statement of the damages claimed to have been sustained by Claimant herein, United States of America, by reason of the collision set forth in the libel. Extensive negotiations looking toward an agreement on the damages have been had between the said parties and there are only a few things items which have not been agreed to. For this reason, and because this Interrogatory seeks to elicit facts concerning the amount of damages rather than facts con-

nected with the liability for the said collision, Libellant excepts to this said Interrogatory No. 1.

2. It is a fact that the Libel herein undertakes to impose lien liability upon the Steamship "EGLANTINE" for the collision which occurred December 21st, 1932, off Galveston, Texas, while the Steamship "EGLANTINE" was owned by the United States of America, and was being operated as a merchant vessel of the United States. Libellant does not know whether such operation was through the United States Shipping Board Merchant Fleet Corporation and Lykes Bros.-Ripley Steamship Co., Inc.

3. Yes.

4. Yes.

5. See answers to Interrogatories Nos. 3 and 4.

(Sgd.) Burlingham, Veeder, Clark & Hupper, (Sgd.) Denegre, Leovy & Chaffe, Proctors for Libellant.

[fol. 26] *Duly sworn to by John E. Craig. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTION OF CLYDE-MALLORY LINES TO ANSWER—Filed August 12, 1938

Now into Court comes Clyde-Mallory Lines, Owner of [fol. 27] the Steamship "BRAZOS", Libellant herein, through its undersigned Proctors, and excepts to the Answer filed herein by the United States of America, Claimant herein, and moves to strike out of said Answer Articles XI, XII, XIII, XIV and XV, and for leave to enter an Interlocutory Decree herein, for the following causes and reason, among others, to wit:

Articles XI, XII and XIII of said Answer attempt to raise an issue as to the application of this suit of the limitation on the beginning of suits prescribed in Section 5 of the Act of Congress approved March 9th, 1920, as amended,

U. S. Code Annotated, Title 46, Sec. 745, as amended, which issue has already been determined by this Court in this case by order dated May 16th, 1938, overruling Claimant's exceptions to the Libel dated June 14th, 1937;

Articles XIV and XV of said Answer attempt to raise the issue of laches, whereas it is plain upon the face of the Libel and the Answer herein that Libellant has not been guilty of laches in seeking a determination of liability for the collision in suit, and that such a determination has already been had by the Libellant and Claimant herein in a proceeding for limitation of liability instituted by Libellant in the United States District Cou for the Southern District of New York, wherein it has been finally determined between the parties hereto that Libellant's vessel Steamship "BRAZOS", and Claimant's vessel, Steamship "EGLANTINE" were both to blame for the collision in suit.

Wherefore Libellant prays that Articles XI, XII, XIII, XIV and XV may be stricken out of the Answer filed herein by the United States of America, Claimant herein, and that Libellant may have leave to enter against said Claimant herein an Interlocutory Decree for the recovery of one-half the difference between the amount of its damages resulting from the collision in suit and Claimant's damages resulting from the collision in suit, together with interest [fol. 28] and costs, and that Claimant, the United States of America, through its Proctors of Record, may be ordered to show cause, if any it has or can, on a day to be fixed by the Court, why the relief herein prayed for by Libellant should not be granted, and Libellant further prays for all other and further relief and orders in the premises as the justice of the cause may require.

(Sgd.) Burlington, Veeder, Clark & Hupper, Denegre, Leovy & Chaffe, Proctors for Libellant, Exceptor and Mover.

Duly sworn to by Jas. Hy. Bruns. Jurat omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF FACTS—Filed January 8, 1941

Without prejudice to the Exceptions to the libel filed by the United States and without prejudice to the Exceptions and the Motion to Strike filed by the Clyde-Mallory Lines in connection with the Answer of the United States of America, it is hereby stipulated by and between the parties hereto that:

1. Libellant herein Clyde-Mallory Lines, is, and at all pertinent times was, a corporation duly organized under the laws of the State of Maine, and owner of Steamship BRAZOS, her engines, etc.;

2. Steamship EGLANTINE was at the time of the service of process in this suit within the jurisdiction of the United States and of this Honorable Court;

3. On December 21, 1932, the BRAZOS and the EGLANTINE were in collision, at which time the EGLANTINE was owned by the United States of America and was being operated as a merchant vessel of the United States;

4. Subsequent to the aforesaid collision of December 21, 1932, but prior to the beginning of this suit, the EGLANTINE was sold by the United States of America [fol. 30] and at the time of the beginning of this suit the EGLANTINE was owned by Lykes Bros.-Ripley Steamship Co., Inc. a Louisiana corporation;

5. On or about December 23, 1932, Clyde-Mallory Lines, the same corporation as the libellant herein, filed in the United States District Court for the Southern District of New York its petition claiming the benefit of the limitation of liability provided in Sections 4282-4286 of the Revised Statutes of the United States as amended, in respect of the aforesaid collision. A copy of said petition is attached hereto, marked Exhibit A. Thereafter, the United States of America duly appeared in said proceeding as owner of the EGLANTINE and filed its claim and its answer to the petition. True copies of the claim and answer are attached hereto, marked respectively Exhibit B and Exhibit C;

6. On or about February 16, 1937 said proceeding duly came on for trial and was tried in the United States District

Court for the Southern District of New York and thereafter said Court held and decided that the EGLANTINE and the BRAZOS were mutually at fault for the aforesaid collision. An interlocutory decree was thereafter duly entered, a true copy of which is attached hereto, marked Exhibit D;

7. Thereafter the United States of America duly appealed to the Circuit Court of Appeals for the Second Circuit from the aforesaid interlocutory decree; said appeal duly came on for argument and was argued, and, after consideration, the Circuit Court of Appeals for the Second Circuit affirmed the aforesaid interlocutory decree, holding that the aforesaid collision resulted from the mutual fault of the BRAZOS and the EGLANTINE. Subsequently a final decree was entered in the United States District Court for the Southern District of New York upon the mandate of the Circuit Court of Appeals for the Second Circuit affirming the [fol. 31] aforesaid interlocutory decree. A true copy of the aforesaid final decree on mandate is attached hereto and marked Exhibit E;

8. As appears from a stipulation of the parties attached to the aforesaid final decree on mandate the damage sustained by Clyde-Mallory Lines, petitioner in that proceeding and libellant in this suit, by reason of the aforesaid collision, amount to the sum of $34,280.93 and the damages sustained by the United States of America by reason of the aforesaid collision, amounted to the sum of $26,621.70, both of these sums being exclusive of interest;

9. The dates upon which the several items of damage sustained by Clyde-Mallory Lines and the United States of America were offered and paid are set forth in a statement attached hereto, marked Exhibit F;

10. The libel filed herein is the first pleading of any kind and the first attempt by Clyde-Mallory Lines, or on behalf of the BRAZOS, seeking to recover affirmatively from the EGLANTINE or the United States of America the damages sustained by Clyde-Mallory Lines or the BRAZOS by reason of the aforesaid collision;

Dated: New Orleans, Louisiana, January 8th, 1941.

Burlingham, Veeder, Clark, & Hupper, Denegre, Leovy & Chaffe, Proctors for Libellant. L. V. Cooley, Jr., Asst. United States Attorney.

[fol. 32] EXHIBIT "A" TO STIPULATION OF FACTS

THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

The Petition of CLYDE-MALLORY LINES, Owner of Steamship Brazos, in a Cause of Limitation of Liability, Civil and Maritime, Alleges

PETITION

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The petition of Clyde-Mallory Lines, owner of steamship BRAZOS, in a cause of limitation of liability, civil and maritime, alleges:

First. At all the times hereinafter mentioned petitioner, Clyde-Mallory Lines, was and now is a Maine corporation, with an office and principal place of business at Pier 36, North River, New York City, within this District, and it was at the time of the collision hereinafter set forth owner of the steamship BRAZOS. At all of said times petitioner manned, victualed and navigated said vessel within the meaning of Section 4286 of the Revised Statutes of the United States.

Second. The BRAZOS is a steel screw vessel, 4497 tons gross and 2793 tons net register, 391.9 feet long, 48.3 feet beam and 26 feet depth, built in Newport News, Virginia, in 1899. The petitioner used due diligence to make said vessel seaworthy, and until the accident hereinafter mentioned she was tight, staunch, strong, fully manned, [fol. 33] equipped and supplied and in all respects seaworthy and fit for the service in which she was engaged.

Third. In the afternoon of December 21, 1932, the BRAZOS sailed from Galveston on a voyage to New York by way of Key West and Miami with cargo. She was under the command of a competent and experienced Master and was manned by competent and experienced officers and crew. The weather was clear, wind light variable, tide ebb. After passing Bouy No. 9, the BRAZOS encountered light, patchy fog and slowed down sounding fog signals as required by law. The master was on the bridge in charge of navigation; the chief officer was also on the bridge, and

the third officer was at the wheel. The second officer and two seamen were in the eyes of the ship, keeping a careful lookout. The boatswain was standing by the anchor. After passing Bouy No. 3, while proceeding cautiously, sounding fog signals at short intervals and keeping a sharp lookout, suddenly a steamship, which proved to be the EGLANTINE, loomed out of the fog dead ahead lying across the channel. The BRAZOS' engines were immediately put full speed astern, the starboard anchor dropped and the helm put hard aport. The BRAZOS' way was almost killed, but her stem struck the EGLANTINE on the port side in the way of No. 2 hold, damaging both vessels. It was ascertained by wireless that the EGLANTINE needed no assistance from the BRAZOS. After examination showed the BRAZOS was making no water, she proceeded on her voyage. The collision occurred in the channel between 5:30 and 6 p. m., BRAZOS time. No fog signals were heard from the EGLANTINE before she came in sight.

Fourth. Those in charge of the BRAZOS were careful at all times in the performance of their duties and navigated the BRAZOS prudently and skillfully. The aforesaid collision and the loss, damage and destruction resulting therefrom were not caused or contributed to by any fault, neglect or want of care on the part of the BRAZOS or [fol. 34] those in charge of her, the petitioner herein or anyone for whom petitioner may be responsible, but were caused solely by the negligence of the steamship EGLANTINE and those in charge of her in the following respects, among others:

1. She was not in charge of a competent person.

2. She failed to keep a good anchor watch.

3. She failed to sound proper signals in fog.

4. She failed to give proper and timely notice of her position under the circumstances of the wind and weather prevailing.

5. She was lying athwart the channel in a position rendering navigation in the vicinity dangerous.

6. She was anchored in an improper place.

7. She negligently and unlawfully anchored in the channel in such a manner as to prevent and obstruct the passage of vessels bound out of Galveston.

8. She negligently failed to take bearings to ascertain her anchored position.

9. She failed to shift her anchorage after it was known or should have been known that she was anchored in the channel or fairway.

10. She failed to hear or heed the BRAZOS' fog signals.

11. She failed to take any or proper precautions to avoid collision when danger of collision was or should have been apparent.

[fol. 35] Fifth. Said collision and the loss, damage and destruction resulting therefrom were occasioned and incurred without the privity or knowledge of petitioner.

Sixth. Petitioner is informed that as a result of the collision the EGLANTINE sustained serious damage to her hull and cargo. At the present time petitioner does not know whether there has been any further damage or the amount of claims for injuries, losses and damages arising out of the collision.

Petitioner has been informed and believes that a suit or suits may be begun in the United States District Court for the Southern District of Texas by United States of America, owner of the EGLANTINE and as bailee of her cargo, against the BRAZOS and/or petitioner to recover for damages sustained as a result of the collision in the sum of $80,000.

Messrs. Bigham, Englar, Jones & Houston, proctors for certain cargo on the EGLANTINE have informed petitioner that they expect to begin a suit in the United States District Court for the Southern District of New York against the BRAZOS to recover for damage sustained by certain cargo as a result of the collision. The amount of the damages is not yet known.

In addition to the foregoing suit or suits, other claims may be made against the BRAZOS and petitioner and further actions or suits instituted against the petitioner and/or the BRAZOS to recover for loss, damage and destruction resulting from said collision.

Seventh. There are no demands, unsatisfied liens or claims of liens against said steamship BRAZOS, her engines, boilers, etc., or any suits pending thereon, so far as is known to your petitioner, except as above set forth.

[fol. 36] Eighth. The value of the steamship BRAZOS upon her arrival in New York following the collision above referred to and at the end of the voyage upon which the collision occurred did not exceed the sum of $23,500. The freight for the transportation of cargo on board the BRAZOS when the collision occurred amount- to $7,988. There was no passage money. Petitioner is advised that the entire aggregate value of the interest of petitioner in said st-amship BRAZOS and her pending freight at the end of the voyage on which the collision occurred does not exceed the sum of $31,500, the value of the BRAZOS in damaged condition at the end of the voyage upon which the collision occurred and her pending freight.

Subject to an appraisal of petitioner's interest on a reference, petitioner offers an ad interim stipulation for value in the sum of $31,500, said sum being in excess of the aggregate value of petitioner's interest in said vessel and her pending freight and passage moneys, if any.

Ninth. The petitioner claims exemption from liability for the losses, damages, injuries and destruction occasioned, incurred or resulting from said collision as aforesaid and/or subsequent damages resulting -herefrom and for the claims for damages that have been made or thereafter may be made, and petitioner alleges that it had valid defenses thereto on the facts and on the law and under the provisions of the contracts for the carriage of cargo, the terms of which contracts will more fully appear upon the trial of this proceeding.

Petitioner further claims the benefit of the limitation of liability provided in Sections 4282, 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States, and the various statutes supplementary thereto and amendatory thereof, and to that end petitioner is ready and willing to give a stipulation with sufficient surety for the payment into Court of the amount or value of the petitioner's interest in the steamship BRAZOS and her pending freight, whenever [fol. 37] the same shall be ordered by this Court, as provided for by the aforesaid statutes, by General Rules 51 and 54 in Admiralty, and by the rules and practice of this Honorable Court.

Tenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your petitioner prays:

1. That this Court cause due appraisement to be made of the amount or value of petitioner's interest in the steamship BRAZOS at the end of the voyage upon which the aforesaid collision occurred, and her pending freight for the aforesaid voyage.

2. That the Court make an order directing the petitioner to file a stipulation, with surety to be approved by the Court, for the payment into Court of the amount of petitioner's said interest whenever the Court shall so order.

3. That the Court make an order directing the issuance of a monition to all persons claiming damages for any and all loss, damage, injury or destruction sustained, occasioned or incurred by or resulting from said collision between the steamship BRAZOS and the steamship EGLANTINE as above set forth, citing them to appear before a commissioner to be named by the Court in said order, and make due proof of their respective claims, and also to appear and answer the allegations of this petition according to the law and the practice of this Court at or before a certain time to be fixed by the monition.

4. That the Court make an order directing that on the giving of such stipulation as may be determined to be proper, or of an ad interim stipulation, an injunction shall issue, restraining the prosecution of any and all actions, [fol. 38] suits and proceedings already begun to recover for damages arising out of, occasioned by or consequent upon, the aforesaid collision between the steamships BRAZOS and EGLANTINE, as stated in this petition, and the commencement or prosecution hereafter of any suit, action or legal proceeding of any nature or description whatsoever, except in the present proceeding, against the petitioner or its agents or representatives, or against the steamship BRAZOS, her engines, etc., or pending freight and passage moneys, if any, in respect to any claim or claims arising out of the aforesaid voyage and collision.

5. That the Court in this proceeding will adjudge that the petitioner is not liable to any extent for any loss, damage or injury or for any claim whatsoever in any way arising out of or in consequence of the aforesaid voyage and collision, or if petitioner shall be adjudged liable, then

that such liability be limited to the amount or value of petitioner's interest in the steamship BRAZOS and her pending freight at the end of the voyage on which she was engaged at the time of said collision, and that petitioner be discharged therefrom upon the surrender of its interest in said steamship BRAZOS and her pending freight, as aforesaid, and that the moneys surrendered, paid or secured to be paid, as aforesaid, be divided pro rata among such claimants as may duly prove their claims before the commissioner hereinbefore referred to, saving to all parties any priorities to which they may be legally entitled, and that a decree may be entered, discharging petitioner from all further liability.

6. That petitioner may have such other and further relief as the justice of the cause may require.

Burlingham, Veeder, Fearey, Clark & Hupper,
Proctors for Petitioner.

(Duly Verified)

[fol. 39] EXHIBIT "B" TO STIPULATION OF FACTS

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A 110-104

In the Matter of the Petition of CLYDE-MALLORY LINES, for Limitation of Liability

And Now Comes the United States of America in the above entitled proceeding and makes claim against the Clyde-Mallory Lines, petitioner herein, and the Steamship BRAZOS as follows:

The United States of America is a corporation sovereign and at the times hereinafter mentioned is the owner of the Steamship EGLANTINE, her engines, boilers, etc., and bailee of the cargo laden in and aboard said steamship.

On December 21, 1932, said Steamship BRAZOS, while proceeding through Galveston Harbor bound to sea, came into collision with, the said Steamship EGLANTINE which was fog bound and lying at anchor, as a result of which, said Steamship EGLANTINE and her cargo sustained serious damage.

Said collision was caused by and contributed to by the fault and negligence of the persons in charge of the said Steamship BRAZOS.

By reason of said collision the United States of America, as owner of Steamship EGLANTINE and bailee of her cargo, has sustained damages in the sum of about $75,000.00, so near as the sum can at the present time be ascertained.

[fol. 40] Numerous claims have been made against the United States of America, as owner of Steamship EGLANTINE, for losses and damages sustained to cargo by reason of said collision and for salvage services rendered to said vessel after the collision aforesaid. It is not now possible and will not be possible before the legal adjudication thereof to state the amount of such claims allowed or proved against the United States of America, but said United States of America makes further claim in addition to its damages as aforesaid and makes such claim against the Clyde-Mallory Lines and said Steamship BRAZOS for all such sums as may be allowed or adjudged against it and hereby gives notice of its intent to hold the Steamship BRAZOS and the Clyde-Mallory Lines responsible for all damages which it may sustain by reason of such allowance and adjudication of claims against it and for all monies which it may be called upon to pay to other persons or corporations for loss, injury or damages arising from said collision.

Dated, New York, N. Y. February 14, 1933.

United States of America, (S.) by George Z. Medalie, United States Attorney. C. E. W.

District Court of the United States, Southern District of New York

State of New York,
County of New York, ss:

Charles E. Wythe, being duly sworn, deposes and says:

[fol. 41] That he is a Special Assistant to the United States Attorney for the Southern District of New York and is in charge of this litigation; that he has read the foregoing Claim and knows the contents thereof, and that the

same is true of his own knowledge except as to the matters therein stated, to be alleged upon information and belief, and that as to those matters he believes it to be true;

That the sources of deponent's information and the grounds of his belief are documents and reports in his possession;

That the reason this verification is made by deponent and not by Claimant is that Claimant is a corporation sovereign.

C. E. Wythe.

Sworn to before me this 14th day of February, 1933. Albert L. Fager, Notary Public, New York County No. 2. New York Co. Register's No. 4-F-301. My Commission expires March 30, 1934. (Seal.)

EXHIBIT "C" TO STIPULATION OF FACTS

ANSWER OF UNITED STATES

To the Honorable the Judges of the United States District Court Southern District of New York:

The Answer of the United States of America, as owner of Steamship EGLANTINE, claimant, to the petition of Clyde-Mallory Lines, owner of Steamship BRAZOS, in a [fol. 42] cause of limitation of liability, civil and maritime, alleges upon information and belief and respectfully shows as follows:

First: Claimant denies any knowledge or information sufficient to form a belief as to the allegations of Article First of the petition.

Second: Claimant denies any knowledge or information sufficient to form a belief as to the allegations of Article Second of the petition.

Third: Claimant denies any knowledge or information sufficient to form a belief as to the allegations of Article Third of the petition, except as hereafter specifically admitted or alleged in Article Eleventh of this Answer.

Fourth: Claimant denies the allegations of Article Fourth of the petition.

Fifth: Claimant denies any knowledge or information sufficient to form a belief as to the allegations of Article Fifth of the petition.

Sixth: Claimant admits that as a result of the collision the EGLANTINE sustained serious damage to her hull and cargo. Further answering, claimant denies any knowledge or information sufficient to form a belief as to the other allegations of Article Sixth of the petition.

Seventh: Claimant denies any knowledge or information sufficient to form a belief as to the allegations of Article Seventh of the petition.

Eighth: Claimant denies any knowledge or information sufficient to form a belief as to the allegations of Article Eighth of the petition.

[fol. 43] Ninth: Claimant denies any knowledge or information sufficient to form a belief as to the allegations contained in Article Ninth of the petition.

Tenth: Claimant admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court and denies the other allegation of Article Tenth of the petition.

Eleventh: Further answering, claimant alleges that in the afternoon of December 21, 1932, the steamship EGLANTINE, inbound with cargo, was lying at anchor off the entrance to Galveston Harbor awaiting a pilot. The weather was foggy, light easterly wind, tide ebb, sea smooth. The EGLANTINE was fully manned, equipped and supplied and in full respects sea worthy. A proper and competent watch was maintained and, prior to the collision hereinafter described, she was displaying regulation anchor lights which were burning brightly. Fog signals prescribed by law for a vessel at anchor were being sounded. While the EGLANTINE was lying so moored, fog signals from a vessel under way which proved to be the BRAZOS were heard approaching on the port side. Shortly thereafter the BRAZOS came out of the fog at a high and dangerous rate of speed and without apparent change of course crashed into the port side of the EGLANTINE, tearing a hole in her side abreast of #2 hatch and causing serious damage to her hull and cargo.

Twelfth: The collision and consequent damage were not due to any fault on the part of this claimant or any person for whom it is responsible but were due solely to the fault and neglect of the steamship BRAZOS and those in charge of her in the following respects among others:

1. She was not in charge of a competent person.

2. She failed to keep a proper lookout.

[fol. 44] 3. She was proceeding at an excessive rate of speed.

4. She failed to keep in the prescribed channel.

5. She failed to stop her engines when the fog signal of the EGLANTINE was or should have been heard forward of her beam.

6. She failed to stop and reverse her engines in time to avoid collision when danger thereof was or should have been apparent.

7. She collided with the EGLANTINE which was a properly moored vessel.

8. She failed to proceed with the caution required by weather conditions.

9. She took no proper steps to avoid collision.

Thirteenth: All and singularly the premises are true.

Wherefore claimant prays that the petition herein be dismissed as to it with costs against the petitioner and that a decree may be entered in favor of this claimant against the petitioner in the amount of its damages with interest and costs, and that this claimant may have such other and further relief as may be just.

George Z. Medalie, United States Attorney, Proctor for Claimant, Office & P. O. Address, 45 Broadway, Borough of Manhattan, City of New York.

(Duly Verified.)

[fol. 45] EXHIBIT "D" TO STIPULATION OF FACTS

Interlocutory Decree

At a Stated Term of the United States District Court for the Southern District of New York, held in the Court Rooms thereof in the United States Court House, Foley Square

in the Borough of Manhattan, City of New York on the 27th day of July, 1937.

Present: Honorable Henry W. Goddard, District Judge.

A 110-104

In the Matter of The Petition of CLYDE-MALLORY LINES, as Owner of S. S. BRAZOS, for Exoneration from or Limitation of Liability

Whereas a verified petition was filed herein on December 28, 1932, by Clyde-Mallory Lines, as owner of S. S. BRAZOS, claiming the benefit of the limitation of liability provided for in Sections 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States and the statutes supplementary thereto and amendatory thereof and praying for exoneration from or limitation of its liability and the liability of any other person or party interested in said steamship, and also contesting its liability independently of the limitation of liability claimed in said petition for any loss, damage, injury or destruction caused by, or resulting from, the collision between S. S. BRAZOS and S. S. EGLANTINE which occurred on December 21, 1932, off Galveston, Texas; and

[fol. 46] Whereas this Court, by an order duly entered herein on December 28, 1932, directed that petitioner file an ad interim stipulation for values for its interest in said S. S. BRAZOS in the sum of $31,500 with interest from December 28, 1932, with surety according to the rules and practice of this Court; and

Whereas an ad interim stipulation, executed by said petitioner and by the International Fidelity Insurance Company as surety, providing for the payment of said sum of $31,500 with interest from December 28, 1932, was duly filed herein on December 29, 1932; and

Whereas this Court, by an order duly entered herein on December 28, 1932, directed that a monition issue out of and under the seal of this Court against all persons claiming damages for any and all losses, damages, injuries or destruction occasioned by, resulting from, or consequent upon the collision between S. S. BRAZOS and S. S. EGLANTINE which occurred on December 21, 1932, and against all persons having any claims against petitioner, S. S. BRAZOS, her engines, boilers and equipment on pending freight and passage monies, if any, citing them to

appear before this Court on February 17, 1933, and make due proof of their respective claims before Anthony Menkel, Esq., Commissioner appointed by this Court to receive such claims, and such a monition having been duly issued herein on December 29, 1932, by the Clerk of this Court, and

Whereas notice of the filing of said petition and the issuance of said monition was duly given by publication as required by law and by the rules and practice of this Court, and upon the return of said monition proclamation having been duly made in open Court; and

Whereas, by several orders duly entered herein, this Court extended the time of any and all persons to file claims [fol. 47] with the Commissioner appointed by the Court to receive claims to October 6, 1933; and

Whereas Anthony Menkel, Esq., the Commissioner appointed to receive claims herein, filed his report with the Clerk of this Court on or about February 20, 1933, and filed supplemental reports on or about May 10, June 26, August 4, and October 11, 1933, from which it appears that certain claims therein enumerated had been presented to him pursuant to the monition issued herein and to the various orders of this Court extending the time within which to file claims; and

Whereas the claims and/or amended claims filed herein by G. E. MADER, master of S. S. EGLANTINE, as bailee, and by Farmer's National Grain Corporation, John Greenwood & Sons, Ltd. and Patrick & Company, Ltd., as shippers and/or consignees of certain cargo laden on board said S. S. EGLANTINE were settled by the payment by petitioner herein to said claimants of the total sum of $26,820.87 as set forth in Schedule A annexed to an order entered herein on July 18, 1936, which order directed that said claims be fully satisfied and discharged and the petitioner herein and its successors and assigns fully released and discharged of any liability whatsoever in respect thereof; and

Whereas an answer to the petition was duly filed herein on behalf of the United States of America, and

Whereas the issues raised by the petition and by said answer of the United States of America, duly came on to be heard before Honorable Henry W. Goddard, District Judge, at a Stated Term of this Court on the 16th day of February, 1937, and the cause having been argued and submitted by the advocates for the respective parties hereto

and the Court, after due deliberation, having filed its opinion in writing on May 20, 1937, finding the facts and its conclusions of law and holding both S. S. BRAZOS and [fol. 48] S. S. EGLANTINE at fault for the collision set forth in the petition herein and for the damages and losses arising therefrom; and

Whereas the petitioner's right to limit its liability under Sections 4282-4286 of the Revised Statutes of the United States as amended (46 U. S. C. A., Sec's 182-186), was conceded upon the trial;

Now, on the motion of Burlingham, Veeder, Clark & Hupper proctors for petitioner, it is

Ordered, Adjudged and Decreed that the petitioner Clyde-Mallory Lines, as owner of S. S. BRAZOS is not entitled to exoneration from all liability as claimed by it in its petition herein, but that the prayer of said petitioner for limitation of its liability herein be, and the same hereby is, granted, and said petitioner is allowed the benefit of such limitation or liability as is provided for in Sections 4282-4286 of the Revised Statutes of the United States as amended (46 U. S. C. A. Secs. 182-186) for any loss, damage, or injury arising out of the matters alleged in the petition herein and that the liability of petitioner for any such loss, damage, or injury arising as aforesaid is hereby limited to the value of petitioner's interest in said S. S. BRAZOS and her pending freight on December 28, 1932; and it is further

Ordered, Adjudged and Decreed that S. S. BRAZOS and S. S. EGLANTINE were mutually at fault for the collision which occurred on December 21, 1932, off Galveston, Texas, and that the claimant, The United States of America, provided its damages exceeds petitioner's damages, recover of and from said S. S. BRAZOS and/or petitioner herein and/or its stipulators for costs and for value in accordance with the terms of their respective stipulations; subject to the limitation of liability allowed herein to petitioner as owner of S. S. BRAZOS, one-half the difference between [fol. 49] the amount of the damages sustained by said claimant as owner of S. S. EGLANTINE and the amount of the damages sustained by petitioner as owner of S. S. BRAZOS, together with interest thereon and together with one-half the difference between the costs incurred by said claimant in establishing the partial fault of S. S. BRAZOS

for said collision and the costs of petitioner to be taxed according to law; and it is further

Ordered, Adjudged and Decreed that the default of all persons or corporations who or which may have sustained or who or which may claim for any loss, damage, injury or destruction resulting or arising from or growing out of the collision referred to in the petition herein and who or which have not heretofore presented or filed claims in this proceeding, be, and the same hereby is, noted and entered; and that all claims which have not heretofore been filed in this proceeding be, and the same hereby are, forever barred and that the petitioner herein and S. S. BRAZOS, be, and they hereby are, discharged from all liability in respect thereof; and it is further

Ordered that all persons or corporations having any claim whatsoever against petitioner herein or against S. S. BRAZOS, except those who have already filed claims, be, and they are perpetually enjoined and stayed from instituting any suit, action or proceeding of any kind whatsoever by reason of the matter set forth in the petition herein; and it is further

Ordered that this matter be referred to Edward H. Childs, Esq., as Special Commissioner to take such further proofs as may be offered as to the amount, validity and priority of all claims filed herein to which objections have been filed, to marshall said claims in accordance with law, and to report thereon to this Court with all convenient speed together with the evidence taken before him in respect to said claims, and with his opinion in addition as respects the various claims filed herein.

[fol. 50] Henry W. Goddard, U. S. D. J.

Notice of settlement of the foregoing Interlocutory Decree is hereby waived.

New York, N. Y., July 22, 1937.

Lamar Hardy, U. S. Attorney for the Southern District of N. Y., by C. E. Wythe, Special Assistant United States Attorney.

EXHIBIT "E" TO STIPULATION OF FACTS

At a Stated Term of the District Court of the United States for the Southern District of New York, held in the Court Rooms thereof in the United States Court House,

Foley Square, Borough of Manhattan, City of New York, on the 5th day of August, 1940.

Present: Honorable Murray Hulbert, District Judge.

Ad. 110-104

In the Matter of The Petition of CLYDE-MALLORY LINES, as Owner of S. S. BRAZOS, for Exoneration from or Limitation of Liability

An interlocutory decree on mandate having been duly entered herein on April 1, 1938, whereby it was ordered, adjudged and decreed (1) that the judgment of the United [fol. 51] States Circuit Court of Appeals for the Second Circuit as set forth in its mandate filed herein in the office of the Clerk of this Court on March 10, 1938, be made the judgment of this Court and that the interlocutory decree entered herein on July 27, 1937, be affirmed; (2) that petitioner was not entitled to exoneration from all liability as claimed by it in its petition herein, but was allowed the benefit of such limitation of its liability as provided for in the Revised Statutes of the United States and limiting petitioner's liability to the value of its interest in S. S. BRAZOS and her pending freight as of December 28, 1932; (3) that S. S. BRAZOS and S. S. EGLANTINE were mutually at fault for the collision which occurred on December 21, 1932, off Galveston, Texas, and that the United States of America, provided its damages exceeded the damages sustained by petitioner, recover of and from S. S. BRAZOS and/or petitioner herein and/or its stipulators for costs and for value, subject to the limitation of liability allowed to petitioner, one-half the difference between the amount of the damages sustained by said claimant as owner of S. S. EGLANTINE and the amount of the damages sustained by petitioner as owner of S. S. BRAZOS, together with interest thereon, and one-half the difference between the costs incurred by said claimant in establishing the partial fault of S. S. BRAZOS for said collision and the costs of petitioner to be taxed; (4) that the default of all persons or corporations who or which had not presented or filed claims in this proceeding be noted and entered and that all claims not filed in this proceeding for any loss, damage, injury or destruction resulting or arising from or growing out of said collision be forever barred, and that petitioner and said S. S. BRAZOS be discharged from all liability in

respect of such claims; (5) that all persons and corporations having any claims whatsoever against petitioner herein or against S. S. BRAZOS, except claimant the United States of America, are perpetually enjoined and stayed from instituting any suit, action or proceeding by reason of the matters set forth in the petition herein; and [fol. 52] (6) whereby this matter was referred to Edward H. Childs, Esq., as Special Commissioner to take such proofs as may be offered as to the amount, validity and priority of the claims filed herein and to report thereon to this Court with all convenient speed; and the damages of the petitioner herein having been stipulated at the sum of $34,280.93, and the damages of the claimant the United States of America having been stipulated at the sum of $26,621.70, as appears by the stipulated dated July 1, 1940, signed by the proctors for the respective parties herein and annexed hereto and made a part hereof;

Now, on motion of Burlingham, Veeder, Clark & Hupper, proctors for petitioner, it is

Ordered, Adjudged and Decreed that the collision described in the petition herein between steamship BRAZOS and steamship EGLANTINE which occurred off Galveston, Texas, on December 21, 1932, was caused by the mutual fault of said vessels and did not occur with the privity or knowledge of said petitioner; and it is further

Ordered, Adjudged and Decreed that petitioner, as owner of steamship BRAZOS, is entitled to limitation of its liability as provided for in Sections 4282-4286 of the Revised Statutes of the United States as amended (46 U. S. C. A. Secs. 182-186) for any loss, damage or injury arising out of the matters alleged in the petition herein and that the liability of petitioner for any such loss, damage or injury arising as aforesaid is hereby limited to the value of petitioner's interest in said steamship BRAZOS and her pending freight as of December 28, 1932, with interest thereon from said date; and it is further

Ordered, Adjudged and Decreed that the claim presented herein by the United States of America for damages to [fol. 53] steamship EGLANTINE having been stipulated at the sum of $26,621.70, which sum is less than the amount of damages sustained by petitioner, as owner of steamship BRAZOS, stipulated at the sum of $34,280.93, as set forth in the stipulation hereto annexed and hereby made a part of this decree, is not recoverable herein, and that said claim

be, and it hereby is, dismissed without costs to petitioner against said claimant; and it is further

Ordered, Adjudged and Decreed that the default of all persons or corporations who or which may have sustained or *are or* which may claim for any loss, damage, injury or destruction resulting or arising from or growing out of the collision referred to in the petition herein and who or which have not heretofore presented or filed claims in this proceeding be, and the same hereby is, noted and entered; and that all claims which have not heretofore been filed in this proceeding be, and the same are forever barred and that the petitioner herein and steamship BRAZOS be, and they hereby are, discharged from all liability in respect thereof; and it is further

Ordered, Adjudged and Decreed that all persons or corporations claiming or who or which may hereafter claim for any loss, damage or injury occasioned by or resulting from the collision referred to in the petition herein be, and the same hereby are, perpetually restrained and enjoined from bringing, commencing or instituting any action or actions or any suits or any proceeding whatsoever against petitioner herein or against the steamship BRAZOS for any loss, damage or injury occasioned by or resulting from said collision; and it is further

Ordered that all bonds and stipulations furnished herein by any of the parties hereto shall be and they hereby are cancelled of record and the sureties thereon discharged from all liability thereunder; and it is further

[fol. 54] Ordered that this decree may be served within the Southern or Eastern Districts of New York in the usual manner and within any other district or districts of the United States by the United States Marshal for such district or districts by delivering a copy of this decree and by exhibiting a certified copy thereof to the party or person to be served.

(Sgd.) Hulbert, U. S. D. J.

A True Copy.

(Sgd.) George J. H. Follmer, Clerk. (Seal).

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A. 110-104

In the Matter of the Petition of CLYDE-MALLORY LINES, as Owner of S. S. Brazos for Exoneration from or Limitation of Liability

It is Hereby Stipulated by and between the petitioner, Clyde-Mallory Lines, and the claimant, United States of America, that the damages sustained by the petitioner and the claimant aforesaid by reason of the collision set forth in the petition herein are as enumerated below:

[fol. 55] Damages of Petitioner

Clyde-Mallory Line

1. Survey at Key West	$76.08
2. Survey at New York	70.60
3. Further survey at New York	60.00
4. Telephone calls	37.60
5. Telegrams	17.34
6. Repairs	2,840.00
7. Settlement of cargo claims	26,820.87
8. Additional cargo claim	104.72
9. Loss of profits during lay-up for repairs	2,718.72
10. Wages during lay-up for repairs	1,235.00
11. Fuel, water and stores consumed during lay-up for repairs	300.00
Total	$34,280.93

Damages of Claimant

United States of America

1. Repairs	$14,980.00
2. Additional repairs	782.00
3. Adjusting compass	75.00
4. Repairs to boat davit	345.00
5. Six ½ inch turnbuckles	7.94
6. Towage	125.00
7. Towage	40.00

8.	Pilotage	20.00
9.	Running lines	10.00
10.	Running lines	7.00
11.	American Bureau, survey	115.00
12.	Salvage Association, surveys	269.79
13.	Pilotage	20.00
14.	Salvage	1,000.00
15.	Towage	300.00
16.	Fresh water	75.25
[fol. 56]		
17.	Fresh water	8.50
18.	" "	7.77
19.	Manila rope	20.40
20.	Tarpaulin	38.48
21.	Wire rope	39.65
22.	Electric lamps	5.11
23.	Discharging and reloading at Galveston	7,496.99
24.	Lighting pier during discharge	12.25
25.	Barges standing by	230.00
26.	Extra wharf hire	189.75
27.	Reconditioning cotton bales	3.90
28.	Reconditioning cotton bales	7.00
29.	Lighting pier	6.85
30.	Wharfage on cotton	139.32
31.	Wharfage on cotton	465.50
32.	Hire of space on pier 36 to dry cotton	7.30
33.	Inward wharfage on corn discharged	224.00
34.	Inward wharfage on staves, etc.	54.39
35.	Shed hire	50.00
36.	Extra shed hire	24.32
37.	Master's extra expenses	14.00
38.	Dunnage to replace dunnage destroyed	60.97
39.	Fuel oil consumed during detention	397.69
40.	Insurance on cargo transhipped on s. s. West Chatala	109.53
41.	Insurance on liens and legal liability	35.00
42.	Fire insurance on cargo discharged	12.43
43.	Insurance on general average liens and disbursements	28.75
44.	Insurance on general average liens and disbursements	18.75
45.	Traveling expense, Lykes Bros.	25.80
46.	Noting protest	2.50
47.	Survey report on damaged cargo at Liverpool	161.95

48. Telephone calls	1.93
49. Fee for collecting general average deposits	352.54
50. Cargo survey at Galveston	625.00
51. Commissions on general average disbursements	252.69
[fol. 57]	
52. Wages and provisions during detention	2,213.92
53. Stores consumed during detention	11.30
54. Directing and supervising discharge and Reloading at Galveston	250.00
55. Drawing general average agreements and obtaining signatures thereto	200.00
56. Valuation of vessel for general average	50.00
57. Mimeographing general average statement	240.00
58. Services of average adjuster	1,826.89
59. Collecting and settling general average	454.85
60. Vessel's general average proportion of allowance to cargo	2.48
61. Loss of freight on cargo of corn damaged in discharging	1,323.47
62. Radios, cables, telegrams	72.65
63. Cost of discharging damaged soya beans at Liverpool	48.27
64. Demurrage	3,000.00
Total	$38,996.82
65. Less Cargo's general average contribution	12,375.12
	$26,621.70

It is Further Stipulated and Agreed that the Computation of Interest on the above items of the damages shall await the disposition of the United States District Court for the District of Louisiana in a suit brought therein by the petitioner herein in which the claimant herein has appeared as claimant of the steamship EGLANTINE, arising out of the same collision.

Dated: New York, N. Y., July 1st, 1940.

(Signed) Burlingham, Veeder, Clark & Hupper, [fol. 58] Proctors for Petitioners. (Sgd.) John T. Cahill, U. S. Attorney, by C. J. Carroll, Special Asst., Proctors for Claimant.

EXHIBIT F TO STIPULATION OF FACTS

Dates of Payment

Brazos' Damages

1. Survey at Key West, December 24, 1933	$76.08
2. Survey at New York, February 16, 1933	70.60
3. Further survey at New York, February 16, 1933	60.00
4. Telephone calls, January 9, 1933	37.60
5. Telegrams, January 9, 1933	17.34
6. Repairs, March 30, 1933	2,840.00
7. Settlement of cargo claims, July 15, 1936	26,820.87
8. Additional cargo claim, Agreed to be paid but not yet paid	104.72
9. Loss of profits during lay-up for repairs January 10, 1933	2,718.72
10. Wages during lay-up for repairs January 10, 1933	1,235.00
11. Fuel, water and stores consumed during lay-up for repairs, January 10, 1933	300.00
Total	$34,280.93

[fol. 59] Eglantine's Damages

1. Repairs. January 13, 1933	$14,980.00
2. Additional repairs. February 3, 1933	782.00
3. Adjusting compass. January 25, 1933	75.00
4. Repairs to boat davit. January 12, 1933	345.00
5. Six ½ inch turnbuckles. February 3, 1933	7.94
6. Towage. January 20, 1933	125.00
7. Towage. January 24, 1933	40.00
8. Pilotage. February 3, 1933	20.00
9. Running lines. February 3, 1933	10.00
10. Running lines. February 3, 1933	7.00
11. American Bureau, survey. January 24, 1933	115.00
12. Salvage Association, surveys. $60 on March 25, 1933 and $209.79 on May 18, 1933	269.79
13. Pilotage. January 10, 1933	20.00
14. Salvage. September 14, 1933	1,000.00
15. Towage. January 11, 1933	300.00
16. Fresh Water. January 20, 1933	75.25
17. Fresh Water. January 26, 1933	8.50

18. Fresh Water. January 15, 1933	7.77
[fol. 60] 19. Manila rope. January 30, 1933	20.40
20. Tarpaulin. February 3, 1933	38.48
21. Wire rope. January 13, 1933	39.65
22. Electric lamps. February 3, 1933	5.11
23. Discharging and reloading at Galveston. February 3, 1933	7,496.99
24. Lighting pier during discharge. January 12, 1933	12.25
25. Barges standing by. February 2, 1933	230.00
26. Extra wharf hire. January 10, 1933	189.75
27. Reconditioning cotton bales. January 18, 1933	3.90
28. Reconditioning cotton bales. January 19, 1933	7.00
29. Lighting pier. February 3, 1933	6.85
30. Wharfage on cotton. February 3, 1933	139.32
31. Wharfage on cotton. February 3, 1933	465.50
32. Hire of space on pier 36 to dry cotton. February 3, 1933	7.30
33. Inward wharfage on corn discharged. February 3, 1933	224.00
34. Inward wharfage on staves, etc. February 3, 1933	54.39
35. Shed hire. February 3, 1933	50.00
36. Extra shed hire. February 3, 1933	24.32
37. Master's extra expenses. March 20, 1933	14.00
[fol. 61]	
38. Dunnage to replace dunnage destroyed. February 10, 1933	60.97
39. Fuel oil consumed during detention. January 9, 1933	397.69
40. Insurance on cargo transhipped on S. S. WEST CHATALA. January 30, 1933	109.53
41. Insurance on liens and legal liability. March 1, 1933	35.00
42. Fire insurance on cargo discharged. March 20, 1933	12.43
43. Insurance on general average liens and disbursements. March 20, 1933	28.75
44. Insurance on general average liens and disbursements. March 20, 1933	18.75
45. Traveling expenses, Lykes Bros. January 4, 1933	25.80

46. Noting protest. January 11, 1933	2.50
47. Survey report on damaged cargo at Liverpool. April 1, 1933	161.95
48. Telephone calls. May 9, 1933	1.93
49. Fees for collecting general average deposits. May 15, 1933	352.54
50. Cargo survey at Galveston. March 1, 1933	625.00
51. Commissions on general average disbursements. December 1, 1933	252.69
52. Wages and provisions during detention. January 9, 1933	2,213.92
53. Stores consumed during detention. January 9, 1933	11.30
[fol. 62]	
54. Directing and supervising discharge and reloading at Galveston. November 17, 1933	250.00
55. Drawing general average agreements and obtaining signatures thereto. December 1, 1933	200.00
56. Valuation of vessel for general average. November 20, 1933	50.00
57. Mimeographing general average statement. December 1, 1933	240.00
58. Services of average adjuster. December 1, 1933	1,826.89
59. Collecting and settling general average. December 1, 1933	454.85
60. Vessel's general average proportion of allowance to cargo. December 1, 1933	2.48
61. Loss of freight on cargo of corn damaged in discharging. July 6, 1933	1,323.47
62. Radios, cables, telegrams. March 1, 1933	72.65
63. Cost of discharging damaged soya beans at Liverpool. March 23, 1933	48.27
64. Demurrage. January 9, 1933	3,000.00
Total	$38,996.82
65. Less cargo's general average contribution. July 15, 1936	12,375.12
TOTAL	$26,621.70

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTE OF EVIDENCE—Filed February 13, 1941

Be It Remembered that when on the 10th day of February, 1941, the above numbered and entitled cause was called for trial before this Honorable Court, the Proctors for Clyde-Mallory Steamship Lines, Libellant herein, produced, offered and filed in evidence, in open Court, the following documents on behalf of Libellant:

1. The Stipulation of Facts entered into between the parties hereto under date of New Orleans, Louisiana, January 8th., 1941, together with all of the Exhibits therein mentioned and attached thereto, to wit:

Exhibit A—Copy of Petition of Libellant for limitation of liability, filed in the United States District Court for the Southern District of New York on or about December 23rd, 1932;

Exhibit B—Copy of Claim of United States of America filed in said Limitation Proceedings;

Exhibit C—Copy of Answer of United States of America filed in said Limitation Proceedings;

[fol. 64] Exhibit D—Copy of Interlocutory Decree of said Court entered in said Limitation Proceedings on July 27th., 1937;

Exhibit E—A certified copy of the Final Decree, on Mandate, of said Court entered in said Limitation Proceedings on August 5th., 1940, and the Stipulation of the parties as to the amount of damages sustained by each, attached to said Final Decree, on Mandate; and

Exhibit F—A statement showing the dates upon which the several items of damages sustained were suffered and paid.

Denegre, Leovy & Chaffe, Proctors for Libelant.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION

New Orleans, Thursday, February 13, 1941.

Court met pursuant to adjournment;

Present: Hon. Wayne G. Borah, Judge. Hon. A. J. Caillouet, Judge.

BORAH, J.:

HEARING ON MERITS & SUBMISSION

This cause came on this day to be heard on the merits.

Present: Henry Bruns, Esq., Proctor for Libellant; L. V. Cooley, Jr., Esq., Asst. U. S. Attorney, for United States of America intervening claimant.

[fol. 65] Whereupon, after hearing arguments of counsel for the respective parties, the matter was submitted upon briefs received this day.

IN UNITED STATES DISTRICT COURT

No. 289. Admiralty

CLYDE-MALLORY LINES

versus

STEAMSHIP "EGLANTINE"

OPINION—Filed April 26, 1941

Burlingham, Veeder, Clark and Hupper, Denegre, Leovy & Chaffe, Proctors for Libellant.

L. V. Cooley, Jr., Assistant United States Attorney, Proctor for Claimant, United States of America.

BORAH, District Judge:

This is a suit by Clyde-Mallory Lines, owner of the Steamship Brazos, against the steamship Eglantine, in rem, on a cause of action arising out of the collision which occurred between said vessels off the entrance to Gal-

veston harbor on December 21, 1932. The material facts are these:

Findings of Fact

The libellant, a Maine corporation is and at all times herein mentioned has been the owner of the Brazos. At the time of the collision the Eglantine was owned by the [fol. 66] United States of America and was being operated as a merchant vessel of the United States.

Subsequent to the collision but prior to the filing of this libel, the Eglantine was sold by the United States and at the time of the beginning of this suit was owned by Lykes Brothers-Ripley Steamship Company, Inc., a Louisiana corporation.

On December 23, 1932, Clyde-Mallory Lines filed in the United States District Court for the Southern District of New York its petition for limitation of liability in respect to the damages growing out of the aforesaid collision, and the United States appeared in said proceedings as owner of the Eglantine and filed its claim and its answer to the petition.

In due course the limitation proceedings came on for trial and the District Court, in determining the question of liability, held that the Eglantine and the Brazos were mutually at fault for the collision. An interlocutory decree was thereafter duly entered; whereupon the United States appealed. On February 21st, 1938 the decree of the District Court was affirmed. 99 F. (2d) 95. However, the final decree was not entered in the District Court until August 5th, 1940, and as will appear from a stipulation of the parties attached to the final decree on mandate, it was then agreed that the damages sustained by Clyde-Mallory Lines, amounted to the sum of $34,280.93 and that the damages sustained by the United States amounted to the sum of $26,621.70, both sums being exclusive of interest.

The present libel is the first pleading of any kind filed by Clyde-Mallory Lines, or on behalf of the Brazos, seeking to recover affirmatively from the Eglantine or the United States the damages sustained by Clyde-Mallory Lines or the Brazos by reason of the aforesaid collision. Upon the filing of this libel on June 10th, 1937, process [fol. 67] in rem was issued against the Eglantine and she was seized and taken into custody by the United States

Marshal of this District. Thereupon and pursuant to the provisions of Section 4 of the Suits in Admiralty Act, U. S. Code, Title 46, Section 744, the United States intervened, alleging among other things that it was a party at interest in the action; that the action was a claim against the United States; and that the United States desired the release of the Eglantine and assumed the liability for the satisfaction of any decree which might be obtained in said cause. Whereupon the Eglantine was released from seizure without the furnishing of bond.

Thereafter the United States filed i-s exception to the libel on the sole ground that "the libel, on its face, indicates that it was not filed in compliance with the provisions of Section 5 of the Suits in Admiralty Act (March 9, 1920, c. 95, sec. 5, 41 Stat. 526; 46 U. S. Code, Section 745, as amended)." The exception came on for hearing and was overruled on the authority of The Basbocal, 295 Fed. 299, a decision from this the Fifth Circuit, and the Caddo, 285 Fed. 643. The Bascobal decision is squarely in point. The exception filed herein raised precisely the same contention and point as was urged in The Bascobal case and the Court there expressly determined that a suit such as the present one is not barred by the limitations prescribed by Section 5 of the Suits in Admiralty Act. It seems plain that the present suit is not one authorized by the Suits in Admiralty Act. It is not a suit against the United States; it is a suit in rem against a vessel privately owned. The United States has voluntarily intervened. Under these circumstances the limitations of Section 5 of the Suits in Admiralty — limiting the time within which suits against the United States may be brought are not applicable to the instant suit, and the au-horities, supra, so hold.

[fol. 68] This suit is now before the Court on final hearing and by agreement has been submitted for final decision and decree solely upon the pleadings and a stipulation of facts. The written stipulation on file recites that the agreement is without prejudice to the exception to the libel filed by the United States and without prejudice to the exceptions and the motion to strike filed by the Clyde-Mallory Lines in connection with the answer of the United States. The last mentioned exceptions and motion to strike have never been submitted to or heard by the Court and they are being submitted at this time for such

action as the Court may find necessary or proper. Under the circumstances, and for convenience of discussion, the questions thus presented will be referred to the merits.

Discussion

There is no issue here as to the right of recovery of the respective vessel owners or as to the amount of damages suffered by each as a result of the collision as these questions were settled in the New York litigation. Under the admiralty practice libellant could not set up against the United States in the limitation proceedings an affirmative claim for its collision damages, even though it had to defend in such proceedings the claim of the United States for its collision damages. Consequently, the Court in its final decree could only dismiss the claim of the United States on the ground that it could not recover any damages in the limitation proceedings because its damages were less than the amount of damages suffered by libellant. And it is because the Court could not in the limitation proceedings award libellant affirmative recovery of one-half of the difference between its damages and those of the United States that libellant is here seeking in this suit to recover such one-half of the difference, or $3,829.61 and interest.

[fol. 69] There are but three questions that arise for decision: (1) The question of prescription or limitation which has already been decided against claimant and which requires no further consideration; (2) The question of laches pleaded by the claimant in its answer; and (3) The fixing of the interest to be awarded.

The plea of laches is predicated on the fact that this libel was filed on June 10, 1937, approximately four and one-half years after the date of the collision. The present suit was filed while the limitation proceedings were still in litigation and before a final decision was rendered on the question of liability, and before the United States District Court, acting under mandate of said decree of the United States Circuit Court of Appeals, finally determined the amount of damages suffered by the respective parties as a result of the collision. There is no merit in the plea. Claimant has had its day in Court both on the merits and in seeking to recover on its claim for damages, and it is now in-

equitably attempting to bar libellant's attempt to recover its damages to which the courts have found in effect that libellant is entitled. It is too plain for argument that libellant has not been guilty of laches in seeking a determination of liability for the collision in suit.

In the stipulation of damages annexed to the final decree in the New York Proceedings it was agreed:

"It Is Further Stipulated And Agreed That The computation of interest on the above items of the damages shall await the disposition of the United States District Court for the Eastern District of Louisiana in a suit brought therein by the petitioner herein in which the claimant herein has appeared as claimant of the steamship Eglantine, arising out of the same transaction."

[fol. 70] While the amount of damages, to be recovered by libellant in this suit is necessarily fixed by the New York decree and the stipulation of record at one-half the difference between the libellant's damages of $34,280.93 and the claimant's damages of $26,621.70, or $3,829.61 (one-half of $7,659.23), it is agreed that the amount of interest at the rate of four per centum per annum shall run as ordered by this Court.

The general rule is to allow interest from the date of the collision. **Managua Nav. Co. et al. v. Aktieselskabet Borgstad**, 7 F. (2d) 990. I find nothing in this case to justify an exception to the general rule.

Conclusions of Law

The fact that the Eglantine was owned and operated by the United States when the cause of action alleged in the libel arose, did not prevent the accrual of that cause of action nor exempt the vessel from libel and seizure after it passed into private ownership and operation.

The fact that the Eglantine was subject to arrest and seizure when this suit was brought by the filing of the libel herein in rem, keeps this suit from being one authorized by the Suits in Admiralty Act, and from being one within the influence of Section 5, and it follows that the limitations in Section 5 are not applicable.

The plea of laches is without merit.

Libellant should have judgment herein against the United States of America for $3,829.61, together with interest at the rate of 4 per centum from December 21, 1932, and costs.

Let a decree be entered accordingly.

New Orleans, Louisiana.
April 25, 1941.

(Signed) Wayne G. Borah, United States District Judge.

[fol. 71] IN UNITED STATES DISTRICT COURT

No. 289 In Admiralty

CLYDE-MALLORY LINES

v.

STEAMSHIP "EGLANTINE"

DECREE—Filed April 29, 1941

This cause came on at a former date to be heard upon the pleadings and proofs adduced on behalf of the respective parties and was argued by Proctors for the parties at interest and submitted, when the Court took time to consider;

Whereupon, and on due consideration thereof, and for written reasons and Findings of Fact and Conclusions of Law of the Court in writing and on file herein;

It Is Ordered, Adjudged And Decreed that there be judgment herein in favor of Libellant, Clyde-Mallory Lines, as prayed for, and that said Libellant, Clyde-Mallory Lines, do have and recover of and from the Claimant and Respondent, United States of America, the full sum of Three Thousand Eight Hundred and Twenty-nine and 61/100 Dollars ($3,829.61), with interest thereon at the rate of Four per centum (4%) per annum from December 21, 1932, until paid, together with all costs of Court.

New Orleans, Louisiana, April 29, 1941.

(Signed) Wayne G. Borah, United States District Judge.

Approved as to form: (Sgd.) Denegre, Leovy & Chaffe, Proctors for Libellant. (Sgd.) L. V. Cooley, Jr., Asst. [fol. 72] U. S. Attorney, Proctor for Claimant & Respondent.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 25, 1941

To The Honorable the Judges of the United States District Court in and for the Eastern District of Louisiana:

Comes now the United States of America, respondent in the above entitled cause, feeling aggrieved by the judgment rendered and entered herein on the 29th day of April, 1941, desiring an appeal from the said judgment of the said date to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons set forth in the Assignments of Error filed in this cause simultaneously with the filing of this petition for appeal, and therefore prays that it be allowed to appeal as aforesaid and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit, under the rules of that Court in such case made and provided.

(Sgd.) Rene A. Viosca, United States Attorney.
(Sgd.) L. Y. Cooley, Jr., Assistant United States Attorney.

[fol. 73] Receipt of copy of foregoing petition for appeal is hereby acknowledged this 28th day of July, 1941, all rights reserved.

(Sgd.) Jas. Hy. Bruns, Attorney for Libellant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed July 25, 1941

The petitioner, the United States of America, hereby assigns error to the opinion, findings and decree of the District Court in the above entitled cause as follows:

(1) The Court erred in entering a final decree against the United States of America for $3,829.61 together with

interest at the rate of four per centum from December 21, 1932, and costs.

(2) The Court erred in holding that the fact that the EGLANTINE was subject to arrest and seizure in an action in rem keeps this suit from being one authorized by the Suits in Admiralty Act.

(3) The Court erred in holding that this action is not an action against the United States.

(4) The Court erred in holding that the fact that the EGLANTINE was owned and operated by the United States when the cause of action arose did not prevent the accrual of that cause of action nor its enforcement against [fol. 74] the vessel in an action in rem after she had passed into private ownership and operation.

(5) The Court erred in holding that Section 5 of the Suits in Admiralty Act is not applicable.

(6) The Court erred in holding that the plea of laches is without merit.

(7) The Court erred in awarding interest from December 21, 1932, until paid.

(8) The Court erred in failing to hold that this suit in rem against the EGLANTINE is not authorized inasmuch as the Suits in Admiralty Act affords the exclusive remedy for the cause of action herein alleged.

(9) The Court erred in failing to hold that the limitation period provided in Section 5 of the Suits in Admiralty Act is a prescription of the right as well as of the remedy.

(10) The Court erred in failing to dismiss the libel, with costs.

(Sgd.) René A. Viosca, United States Attorney.
(Sgd.) L. V. Cooley, Jr., Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 25, 1941

[fol. 75] This cause coming on to be heard on petition of the United States of America for permission to appeal from a decree of this Court entered herein on the 29th day of April, 1941, and the Court being fully advised in the premises, it is hereby

Ordered and Adjudged that an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the judgment of this Court heretofore rendered and filed herein on the 29th day of April, 1941, be and the same is hereby allowed; that a transcript of the record, proceedings and documents upon which the judgment of this Court was based, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit, and that a proper citation issue.

Dated this 25th day of July, 1941.

(Signed) A. J. Caillouet, United States District Judge.

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE—Filed August 20, 1941

To: The Clerk of the United States District Court for the Eastern District of Louisiana, New Orleans Division:

It is agreed by and between the undersigned Proctors for the parties hereto that the record on appeal shall be made up and include the following, to-wit:

[fol. 76] 1. Original Libel.

2. Admiralty Process and return thereon.

3. Intervention on behalf of the United States of America and return of service thereon.

4. Order of Release dated June 10th, 1937.

5. Exceptions of the United States of America.

6. Minute entry showing hearing on Exceptions and Order dismissing the same.

7. Answer of the United States of America with attached Interrogatories.

8. Exception and Answer of Libellant to the Interrogatories.

9. Exceptions of Libellant to Answer of the United States of America.

10. Stipulation of Facts by the parties, dated January 8th, 1941, together with exhibits annexed thereto, marked Exhibit A, Exhibit B, Exhibit C, Exhibit D, Exhibit E, Exhibit F.

11. Note of Evidence on behalf of libellant.

12. Minute entry of submission on final hearing dated February 13th, 1941.

13. Opinion of Court with the Findings of Fact and Conclusions of Law.

14. Final Decree.

15. Petition for Appeal.

[fols. 77-78] 16. Assignments of Error.

17. Order of Appeal.

18. Citation of Appeal and return thereon.

19. This Praecipe.

Burlingham, Veeder, Clark & Hupper, Denegre, Leovy & Chaffe, Proctors for Libellant. L. V. Cooley, Assistant United States Attorney.

New Orleans, Louisiana, August 20th, 1941.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 79] That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 25th, 1942

No. 10043

UNITED STATES OF AMERICA, Owner, etc., of Steamship "Eglantine",

versus

CLYDE-MALLORY LINES

On this day this cause was called, and, after argument by J. Frank Staley, Esq., Attorney, Department of Justice, for appellant, and Jas. Hy. Bruns, Esq., for appellee, was submitted to the Court.

[fol. 80] OPINION OF THE COURT—Filed April 29, 1942.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10043

UNITED STATES OF AMERICA, Owner, etc., of Steamship "Eglantine", Appellant,

versus

CLYDE-MALLORY LINES, Appellee

Appeal from the District Court of the United States for the Eastern District of Louisiana

(April 29, 1942)

Before Hutcheson, Holmes, and McCord, Circuit Judges

HOLMES, Circuit Judge:

The Steamship Brazos, owned by the Clyde-Mallory Lines, and the Steamship Eglantine, owned by the United States and operated as a merchant vessel, collided in a fog off Galveston, Texas, on December 21, 1932. In limitation-of-liability proceedings promptly brought by Clyde-Mallory Lines, it was determined that the collision was caused

[fol. 81] by mutual fault, and the damages were fixed at $34,280.93 to the Brazos and $26,621.07 to the Eglantine.

On June 10, 1937, a libel *in rem* was brought by Clyde-Mallory Lines against the Eglantine, which was then privately owned, to recover one-half the difference between the damages sustained by the two vessels. Upon suggestion of interest by the United States in accordance with Section 4 of the Suits-in-Admiralty Act [1] the Eglantine was released, and the cause proceeded against the United States. Exceptions to the libel were filed by the United States on the ground that the action was not instituted within the time prescribed by Section 5 of the Suits-in-Admiralty Act. The exceptions were overruled, issue was joined, the cause proceeded to trial and resulted in a judgment for the libellant. On appeal from that judgment the vital question is: Does the two-year limitation period prescribed by Section 5 of the Suits-in-Admiralty Act apply to suits brought against a private vessel upon a cause of action that accrued when that ship was owned and operated by the United States as a merchant vessel?

The Suits-in-Admiralty Act was passed March 9, 1920. Since that time two cases have been before the courts involving the question here presented: *The Bascobal*, 295 Fed. 299, decided by this court in 1923, and *The Caddo*, 285 Fed. 643, a district-court decision rendered in 1922. In each instance the court held that the one-year limitation imposed by the Act upon suits brought against the Government on causes of action arising prior to its passage was not applicable to a libel *in rem* brought after the ship had passed from the Government into private ownership. In each instance the conclusion was reached by construing the section to embrace only in *personam* actions against the [fol. 82] Government itself. This Act, like any other that waives sovereign immunity from suits, should be strictly construed in favor of, not strictly construed against, the interests of the United States.[2] Guided by this fundamental principle of construction, and considering the Act as a whole, the maritime history forming its background,

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[1] 41 Stat. 526, 46 U. S. C. A., Sec. 744.

[2] Schillinger v. U. S., 155 U. S. 163; Price v. U. S. 174 U. S. 373; Eastern Transportation Co. v. U. S., 272 U. S. 675; U. S. v. Michel, 282 U. S. 656.

the obvious legislative purposes intended to be accomplished thereby, and the related decisions that evolved as the Act was subsequently applied, we are forced to the conclusion that the *Bascobal* and *Caddo* decisions should not be followed here.

No one questions the power of the United States to place limitations upon its gratuitous waiver of its sovereign immunity. By Sections 2, 3, and 4 of the Suits-in-Admiralty Act, the United States imposed personal responsibility upon itself for maritime torts committed by it, fixing an equal potential liability upon itself whether its vessels remained in its hands or were sold to private owners. By Section 5 thereof it required all suits authorized by the Act to be brought within two years after the cause of action arose.

The obvious purpose of Section 5 was to place a limitation upon all liability created by the Act against the United States. Since the United States was subject only to personal liability for its torts, and since the extent of that liability was not in any wise affected by the sale of a vessel to a private owner, unless the unmistakable language of the Act forbids any other construction it is most unreasonable to attribute to Congress an intention to limit the time for filing a suit where the vessel remains in the hands of the Government, and to place no limitation at all upon a suit designed to impose an identical liability upon it where the vessel has been sold.

[fol. 83] The act of the Eglantine in colliding with the Brazos was not a tort unless the laws of the United States had made it so. If the United States had not waived its sovereign immunity from suit, no cause of action would have accrued to the owners of the Brazos either while the vessel remained the property of the Government or after it passed into private ownership.[3]

At the time the accident occurred, the Suits-in-Admiralty Act furnished the exclusive remedy in admiralty against the United States on all causes of action arising out of the operation of its merchant vessels.[4] The sovereign im-

[3] The Western Maid, 257 U. S. 419.

[4] U. S. Shipping Board, etc. v. Rosenberg Bros., 276 U. S. 202; Johnson v. U. S. Shipping Board, 280 U. S. 320; Cory Bros. v. U. S., 51 F. (2) 1010; Norton v. Southern Ry. Co. 246 N. Y. S. 676; Benedict on Admiralty, 6th Ed., Sec. 209.

munity of the United States having been waived, an action for tort arose; and the Suits-in-Admiralty Act was the only law by which this result was accomplished. Therefore, the cause of action existed by virtue of the Suits-in-Admiralty Act, was authorized only by that Act, and could not have been effectively prosecuted but for the provisions of that Act.

The revelant portion of Section 5 of the Suits-in-Admiralty Act, as amended June 30, 1932, is as follows: "Suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises."[5] This provision distinguished between suits as to time only. If the cause of action arose prior to March 9, 1920, all suits, with no differentiation as to the nature of the action or as to the defendant thereto, were required to be brought prior to March 10, 1921. All others, by necessary implication meaning all suits brought on causes of action arising after March 9, 1920, must be brought within two years after the cause of action arose.

[fol. 84] It thus appears that the cause of action here sued upon was created by virtue of the Suits-in-Admiralty Act; that all suits upon such causes of action were required by the Act to be brought within two years after the cause of action arose; and that it was the intention of Congress to limit its liability resulting from the waiver of its sovereign immunity without regard to whether it still owned or had sold its vessels. This suit was not brought within two years after the cause of action arose, and the exceptions to the libel should therefore have been sustained.

The judgment appealed from is reversed, and the cause is remanded to the court below for further proceedings not inconsistent with this opinion.

HUTCHESON, Circuit Judge, dissenting:

I think the *Bascobal* Case was well decided. On its authority I dissent.

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[5] 47 Stat. 420; 46 U. S. C., Sec. 745; 46 U. S. C. A., Sec. 745.

[fol. 85] JUDGMENT

Extract from the Minutes of April 29th, 1942

No. 10043

UNITED STATES OF AMERICA, Owner, etc., of Steamship "Eglantine",

versus

CLYDE-MALLORY LINES

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

"Hutcheson, Circuit Judge, dissents."

[fol. 91] ORDER DENYING REHEARING

Extract from the Minutes of June 2nd, 1942

No. 10043

UNITED STATES OF AMERICA, Owner, etc., of Steamship "Eglantine",

versus

CLYDE-MALLORY LINES

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 92] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 93] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: "File No. 46,759. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 265. Clyde-Mallory Lines, Petitioner, vs. Steamship "Eglantine," and the United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 29, 1942. Term No. 265 O. T., 1942.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 265

CLYDE-MALLORY LINES,
Petitioner (Libellant-Appellee),

against

STEAMSHIP EGLANTINE,
UNITED STATES OF AMERICA,
Respondent (Intervenor-Appellant).

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

Post Printing Company, Inc., 103 Lafayette Street, New York, N. Y.

SUBJECT INDEX

TABLE OF CASES CITED

TABLE OF STATUTES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No.

CLYDE-MALLORY LINES,
Petitioner (Libellant-Appellee),

against

STEAMSHIP EGLANTINE,
UNITED STATES OF AMERICA,
Respondent (Intervenor-Appellant).

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner, Clyde Mallory Lines, a Maine Corporation, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit rendered April 29, 1942 reversing a final decree in admiralty of the District Court for Eastern Louisiana filed April 29, 1941 (R. 71). That decree granted recovery to petitioner under its libel brought in rem against steamship *Eglantine* to recover for collision damage to libellant's steamer *Brazos*.

Jurisdiction

Jurisdiction is based on 240 (a) of the Judicial Code as amended, 28 U. S. Code §347.

The judgment below was entered April 29, 1942 (R. 85).

Summary Statement

A collision between petitioner's steamship *Brazos* and steamship *Eglantine* occurred on December 21, 1932. The *Eglantine* was owned by the United States and was operated as a merchant vessel (R. 29). Shortly thereafter petitioner filed in the District Court for Southern New York a petition for limitation of liability in which the United States appeared and made claim for its damages sustained in the collision. That proceeding resulted in a decision holding both vessels at fault. The United States appealed and the Circuit Court of Appeals for the Second Circuit affirmed. Thereafter petitioner and the United States stipulated the damages sustained by each, it being agreed that petitioner's damages (*Brazos*) exceeded the *Eglantine's* damages (R. 30-1). Meantime the *Eglantine* was sold by the United States to Lykes Bros.-Ripley Steamship Co. Inc. Thereafter, on June 10, 1937, petitioner filed its libel in the District Court for Eastern Louisiana setting forth the New York limitation proceedings and claiming one-half the difference between its damages and the *Eglantine's* damages arising out of the collision (R. 4-8). Process issued and the *Eglantine* was seized, but was released upon the suggestion of the United States attorney that the United States was a party at interest (R. 9-13).

After its intervention in petitioner's suit against the *Eglantine* the United States raised the defense that the suit was not brought within the two year Statute of Limitations contained in the Suits in Admiralty Act, Act of March 9, 1920, 41 Stat. 526, 46 U. S. Code §745 (R. 14-22). The case was tried upon stipulated facts (R. 29-31).

The Decisions Below

The District Court held (R. 65-70) that a lien accrued in favor of petitioner against the *Eglantine* in rem when the collision occurred and that this suit, being one against the privately owned *Eglantine in rem* and not a suit against the United States, is not controlled by the two-year limitation of the Suits in Admiralty Act. It entered a decree in favor of petitioner for half the difference between petitioner's damages and respondent's damages, viz., $3,829.61, with interest.

The Circuit Court of Appeals ignored petitioner's collision lien, brushed aside the fact that this is not a suit against the United States but one against the privately owned *Eglantine in rem*, held that the cause of action was created by virtue of the Suits in Admiralty Act and applied the two-year limitation of that act (R. 80-4). Accordingly, it reversed with directions to dismiss the libel.

Hutcheson, C. J., dissented (R. 84).

Statutes Involved

§9, Shipping Act of 1916, 46 U. S. Code §808.

* * *

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be

operated only under such registry or enrollment and license. *Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner*, in whole or in part, or hold any mortgage, lien, or other interest therein" (italics ours).

• • •

§§4, 5, Suits in Admiralty Act, March 9, 1920, 46 U. S. Code §§744, 745.

"§744. *Release of privately owned vessel after seizure.* If a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this chapter. (Mar. 9, 1920, c. 95, §4, 41 Stat. 526.)

§745. *Causes of action on which suits may be brought; limitations.* Suits as herein authorized shall be brought within two years after the cause of action arises." (Mar. 9, 1920, c. 95, §5, 41 Stat. 526.)

Question presented

Does the two-year statute of limitations contained in §5 of the Suits in Admiralty Act limit the time within which suit may be brought against a privately owned vessel to recover for collision damage that occurred while such vessel was owned by the United States and employed as merchant vessel?

Reasons relied on for the allowance of the Writ.

1. The decision below is in direct conflict with the decisions of this Court as to the meaning and effect of §9 of the Shipping Act of 1916.

2. The decision below is in direct conflict with the decision in the Second Circuit on the same point, viz. *The Caddo*, 285 Fed. 643 (S. D. N. Y.).

3. The decision below is in direct conflict with the Fifth Circuit's prior decision on the same point, viz. *The Bascobal*, 295 Fed. 299 (C. C. A. 5).

4. The question presented is one of general public importance and the decision below constitutes a plain misapprehension of the purpose and effect of the Suits in Admiralty Act.

WHEREFORE petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and send to this court for its review and determination a full and complete transcript of the record below, and that the decision of said Circuit Court of Appeals be reversed and that petitioner have such other and further relief as may be just.

CLYDE MALLORY LINES
By CHAUNCEY I. CLARK
EUGENE UNDERWOOD
Counsel

Certificate

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

CHAUNCEY I. CLARK
Counsel
27 William Street,
New York City.

Dated: New York,
July 27, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

CLYDE-MALLORY LINES,
Petitioner (Libellant-Appellee),

against

STEAMSHIP EGLANTINE,
UNITED STATES OF AMERICA,
Respondent (Intervenor-Appellant).

BRIEF IN SUPPORT OF PETITION

POINT I

The decision below is in direct conflict with the law in this Court as to the meaning and effect of Section 9 of the Shipping Act of 1916.

The basis of the decision below is, as the Court said:

"* * * that the cause of action here sued upon was created by virtue of the Suits in Admiralty Act; * * *" (R. 84).

The libel is based upon a collision lien which, as this Court held in *The Lake Monroe*, 250 U. S. 246, accrues in favor of a private vessel owner when his vessel is in collision with a vessel owned by the United States employed, as was the *Eglantine*, in the merchant service. The *Lake*,

Monroe involved a collision between the privately owned *Helena* and the *Lake Monroe* owned by the United States. A libel was filed in the District Court for Massachusetts *in rem* to recover the collision damage sustained by the *Helena* and process for the seizure and attachment of the *Lake Monroe* was prayed for. The United States appeared specially, suggested that the Court was without jurisdiction to enforce a collision lien against the *Lake Monroe* and obtained in this Court an order to show cause why a writ of prohibition or mandamus should not issue to prevent the District Court for Massachusetts from directing the arrest of the *Lake Monroe* under process. This Court, after referring to Section 9 of the Shipping Act of 1916, held that by virtue of its provisions, a collision lien arises in favor of a private vessel owner against a publicly owned vessel employed in the merchant service and discharged the order to show cause saying:

"We deem it clear, also, that among the liabilities designated by the section [Section 9] is the liability of a merchant vessel to be subjected to judicial process in admiralty for the consequences of a collision" (p. 256).

In *Blamberg Bros.* v. *United States*, 260 U. S. 452, this Court stated the purpose of the enactment of the Suits in Admiralty Act as follows:

"This Act was passed to avoid the embarrassment to which the Government found itself subjected by the Act of September 7, 1916, c. 451, 39 Stat. 728, by the ninth section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime liens. The *Lake Monroe*, 250 U. S. 246" (p. 458).

In *Eastern Transportation Company* v. *United States*, 272 U. S. 675 this Court said:

"It was this view which led us in Blamberg Bros. v. United States, 260 U. S. 452, to hold that, as the substitution by the Suits in Admiralty Act was merely to furnish a balancing consideration for the immunity of the United States from seizure of its vessels employed as merchant vessels previously permitted, *the Act did not apply in cases in which the seizure of a merchant vessel of the United States could not be prevented by the Act*, in a foreign port and court, where the immunity declared by Congress could not be given effect." (p. 686, italics ours).

Since "the Act did not apply in cases in which the seizure * * * could not be prevented * * * " it does not apply here because here the seizure could not be prevented. It was not prevented. The *Eglantine* was actually seized under process and this was properly done because she was privately owned (R. 10).

Below, respondent contended that §9 of the Shipping Act of 1916 was repealed by the Suits in Admiralty Act. However, that section appears to this day in the United States Code as §808 of Title 46. If it was repealed by the Suits in Admiralty Act, its repeal was inadvertent and quickly cured, for in §18 of the Act of June 5, 1920, c. 250, 1920, 41 Stat. 994, less than three months after the enactment of the Suits in Admiralty Act, the Congress reenacted §9 of the Shipping Act of 1916, amending it somewhat but in no particular that bears upon the language construed by this Court in *The Lake Monroe, supra*, as giving rise to a maritime collision lien.

POINT I.

The decision below is in direct conflict with the decision in the Second Circuit on the same point, viz., *The Caddo*, 285 Fed. 643.

The Caddo, 285 Fed. 643, (S. D. N. Y.) involved precisely the same point as that presented here and holds that the time limitation contained in §5 of the Suits in Admiralty Act does not apply to a suit upon a collision lien that accrued while the vessel was publicly owned and employed in the merchant service. The tug *Retriever* (renamed *M. Moran*), while owned by the United States and employed as a merchant vessel, collided with a privately owned barge, the *Caddo*, on February 12, 1920. The owner of the *Caddo* libelled the *Retriever in rem* on June 22, 1921, she having been sold in the meantime by the United States to a private owner. The United States intervened and contended that the suit, having been begun more than one year after the cause of action arose, was filed too late—the applicable statute of limitations was one year instead of two years in respect of causes of action accruing prior to the enactment of the Suits in Admiralty Act.

The Court held that because of the provision made by §4 of the Suits in Admiralty Act, Title 46, U. S. Code §744, *supra*, p. 4, for precisely the kind of suit there, and here, presented, the statute of limitations contained in §5 of the Suits in Admiralty Act is not applicable to a suit brought *in rem* against a privately owned vessel upon a collision lien accruing while such vessel was owned by the United States and employed in the merchant service. The decision below cannot be reconciled with the decision in *The Caddo*.

In *The Caddo* the Government likewise contended that §9 of the Shipping Act of 1916 had been repealed by the Suits in Admiralty Act. The Court held that it had not been repealed.

POINT III

The decision below is in direct conflict with the Fifth Circuit's prior decision on the same point, viz., *The Bascobal* 295 Fed. 299.

The Bascobal, 295 Fed. 299 (C. C. A. 5) involved precisely the same point as that presented here and holds that the time limitation contained in §5 of the Suits in Admiralty Act does not apply to a suit upon a lien that accrued while the vessel was publicly owned and employed in the merchant service. Coal laden on barge *Richmond* was lost due to the negligence of tug *Bascobal* which had the *Richmond* in tow on January 5, 1920. At that time the *Bascobal* was owned by the United States and operated as a merchant vessel. She was subsequently sold to a private owner and the libel was filed against her on March 22, 1922, more than one year after the cause of action accrued and after the expiration of the one year Statute of Limitations provided by §5 of the Suits in Admiralty Act with reference to causes of action accruing before the enactment of that Act. The Government contended that the one year limitation in section 5 applied. The Circuit Court of Appeals for the Fifth Circuit, relying upon §9 of the Shipping Act of 1916 and the decision of this Court in *The Lake Monroe*, *supra*, 250 U. S. 246, held that a lien accrued against the *Bascobal* when libellant's coal was lost and that its accrual was not prevented by Government owner-

ship of the *Bascobal*. The Court further held that because of the provisions in §4 of the Suits in Admiralty Act for suits against privately owned vessels on causes of action arising during public ownership, the Statute of Limitations contained in §5 of the Suits in Admiralty Act was not applicable.

The decision below and the decision of the same Court in *The Bascobal* cannot be reconciled.

In the case at bar Hutcheson, C. J., dissented on the ground that "The *Bascobal* case was well decided" (R. 84).

POINT IV

The question presented is one of general public importance and the decision below constitutes a plain misapprehension of the purpose and effect of the Suits in Admiralty Act.

§9 of the Shipping Act of 1916 and the Suits in Admiralty Act grew out of the great increase in Government ownership of vessels incident to the last war. During Government ownership and operation many claims arose. The Suits in Admiralty Act was enacted to facilitate suit on such claims without the coincident delay resulting from the attachment of vessels under process and the formality of the Government's giving a release bond. Following the termination of the war a great many Government owned vessels were sold to private interests. Congress recognized that these vessels might and would be sued *in rem* on the basis of liens created by virtue of §9 of the Shipping Act of 1916 and made special provision for such suits in §4 of the Suits in Admiralty Act.

Now, in another war, Government ownership of vessels is increasing rapidly. The operation of these vessels will

give rise to many claims. Many of these vessels will doubtless be sold to private interests following the termination of hostilities and claims will be asserted against them *in rem* in respect of causes of action accruing during Government ownership and operation. The volume of litigation under the Suits in Admiralty Act following the last war is not likely to afford a minimum criterion of the volume of litigation likely to ensue following the current war. The rights of claimants *in rem* against vessels sold to private owners before the assertion of claims is therefore patently a matter of general public importance from which it follows that the question raised by the two different decisions of the Circuit Court of Appeals for the Fifth Circuit and by the conflict between the latter decision of that Court (in the case at bar) and the decision in the Second Circuit should be resolved by this Court.

The purpose of the Suits in Admiralty Act, as stated by this Court in *Blamberg Brothers v. United States*, *supra*, 260 U. S. 452, 458 was to avoid the embarrassment to which the Government found itself subjected by the attachment of vessels owned by it and in its service. This purpose was altogether unrelated to whether or not the same vessel might be seized under process after the Government had sold it to a private owner and ceased to operate it. A seizure at such time could not delay or embarrass the Government. Basically, therefore, there was no need to make the Statute of Limitations contained in §5 of the Suits in Admiralty Act applicable to suits brought after sale to private owners and Congress, by clear and certain terms, provided that §5 should not apply to such cases.

The first four words of §5 are "suits as herein authorized" and it is to such suits only that the statute of limi-

tation is made applicable. The Suits in Admiralty Act did not authorize such a suit as the one at bar, viz. one against a privately owned vessel *in rem*. That act authorized *suits against the United States in personam*. This is not such a suit but was begun as a simple suit *in rem* against the privately owned vessel (Libel, R. 4-8). The United States came into this suit by voluntary intervention (R. 11-12).

The Act itself contains, almost by definition, proof that this is not a suit "authorized" by the Suits in Admiralty Act. §8 of the Act, Title 46 U. S. Code §748 provides:

"Any final judgment rendered in any suit herein authorized, *and any final judgment within the purview of §§744* * * * shall * * * be paid by the proper accounting officers of the United States * * *." (italics ours.).

This section provides for the payment of judgments in the various classes of cases to which the Act refers. One class is "any suit herein authorized". Another class is "any final judgment within the purview of §744 * * *," i.e. §4 of the Act. If a suit to which §4 of the Act applies were a "suit herein authorized" there would be no necessity for referring to it separately in §8. Congress, therefore, plainly had in mind that a judgment obtained in the kind of suit to which §744, §4 of the Act, applies is not a "suit herein authorized". In its first decision on the point, *The Bascobal, supra*, the Circuit Court of Appeals for the Fifth Circuit so held, and the District Court for Southern New York so held in *The Caddo, supra*.

§4 of the Suits in Admiralty Act expressly makes provision for suits such as the one at bar and it does not contain any time limitation with reference to such suits, i. e. Congress was presumably content to allow the general

admiralty principle of laches to apply. §4, *supra* p. 4, provides that where a privately owned vessel is attached upon a cause of action arising during prior Government ownership the vessel shall be released without bond upon the suggestion of the Government's interest by the United States attorney. The very fact that provision is expressly made for this category of suit, coupled with the fact that Congress limited the application of §5 to suits against the United States *in personam*, i. e. "suits as herein authorized," establishes the patent misconception of the Court below as to the meaning of the Suits in Admiralty Act, the error of its decision in this case and the rectitude of the earlier decisions in *The Bascobal, supra,* and *The Caddo, supra.*

The decisions of this Court relied upon below by the respondent for the purpose of establishing that the law had changed subsequent to the decisions in *The Bascobal, supra,* and *The Caddo, supra,* do not in any way relate to the point at issue.

The Western Maid, 257 U. S. 419 dealt with three collisions. The Government vessel in each one was in the *public* as distinguished from the *merchant* service. This court held that no lien accrued but this court was careful to point out (pp. 431-2) that these were *public* not *merchant* vessels. It was upon this basis alone that this court held that there was no lien. We do not here dispute the propriety of the decision in *The Western Maid.* It has no application here, however, because the vessel here involved, as in *The Bascobal, supra,* and *The Caddo, supra,* was in the *merchant* service, and in respect of such vessels liens arise under the terms of §9 of the Shipping Act of 1916, which is not applicable to public vessels.

Respondent contended below that the Suits in Admiralty Act affords the exclusive remedy upon maritime claims against the United States. We do not here contest that assertion provided it be correctly understood. In *United States Shipping Board Emergency Fleet Corporation* v. *Rosenberg Brothers & Co.*, 276 U. S. 202, relied upon below by respondent, admiralty suits had been brought against the Emergency Fleet Corporation. Of the question presented for decision this court said:

"And the question here presented as to the effect of the [Suits in Admiralty] Act is whether, as the Fleet Corporation contends, the remedy given against it by a libel *in personam* in admiralty under the provisions of the Act, is exclusive; or whether, as the libelants contend, this remedy is not exclusive and the Fleet Corporation may also, as a private corporation, be sued in admiralty by a libel *in personam*, independently of the provisions of the Act" (p. 212).

All that this Court decided was that suits against the Emergency Fleet Corporation can be brought only under the Suits in Admiralty Act. This Court indicated precisely what its decision was and took care that its decision could not fairly be enlarged, saying:

"It follows that after the passage of the Act no libel in admiralty could be maintained *against the United States or the corporations* on such causes of action except in accordance with its provisions; and that as the libels in these cases were not brought against the Fleet Corporation within the period prescribed by §5 they were barred" (p. 214; italics ours).

Johnson v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320 involved four suits. The Johnson case was an action at law brought against the Emergency Fleet Corporation in the courts of New York

State to recover damages for personal injuries. The Lustgarten case was an action at law brought against the Fleet Corporation in the District Court for Southern New York to recover for personal injuries. The Royal Insurance Company cases were actions at law against the Emergency Fleet Corporation in the courts of New York State to recover for damage to cargo. The Federal Sugar Refining Co. case was a suit under the Tucker Act. Obviously none of these cases presented any questions relating to the suit at bar. Neither the United States nor the Fleet Corporation is sued here, nor is this either an action at law or a suit under the Tucker Act.

We do not deny that one who has a maritime claim against the United States must sue the United States in the manner and within the time provided for under the Suits in Admiralty Act. This, however, is not such a suit. Petitioner asserts a maritime lien against a privately owned vessel, viz. the *Eglantine*, and relies upon the unrepealed provisions of §9 of the Shipping Act of 1916 for the existence of its lien. It has no claim, and has asserted no claim, against the United States. The Attorney General, as permitted by §4 of the Suits in Admiralty Act, has intervened in a suit not brought against the United States and has sought to apply to such a suit the time limitation provided by §5 of the Suits in Admiralty Act in respect of suits against the United States, i. e. "suits as herein authorized".

Respondent's position is wholly unmindful of the facts and justice of the case. The merits of the collision were litigated to a conclusion between petitioner and respondent with the result that the vessels were held both to blame.

As petitioner's damages exceeded respondent's damages it is, upon familiar admiralty principles, encumbent upon the *Eglantine* to pay to the *Brazos*, petitioner's vessel, half the difference between their damages to the end that the monetary loss shall be borne equally. Respondent has sought, unsuccessfully in the District Court, successfully in the Circuit Court of Appeals by a two to one decision, to escape payment of this just debt to the *Brazos*.

LAST POINT

It is respectfully submitted that a writ of certiorari should be granted, that the decision of the Circuit Court of Appeals should be reversed and that the decree of the District Court should be reinstated.

CHAUNCEY I. CLARK
EUGENE UNDERWOOD
Counsel for Petitioner

Dated: New York,
July 27, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 265

CLYDE-MALLORY LINES,
Libellant-Petitioner,

v.

STEAMSHIP EGLANTINE,
UNITED STATES OF AMERICA,
Intervenor-Respondent.

PETITIONER'S BRIEF

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

Post Printing Company, Inc., 103 Lafayette Street, New York, N. Y.

SUBJECT INDEX

TABLE OF CASES CITED

TABLE OF STATUTES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

CLYDE-MALLORY LINES,
Libellant-Petitioner,

v.

Steamship EGLANTINE,
UNITED STATES OF AMERICA,
Intervenor-Respondent.

No. 265

PETITIONER'S BRIEF

Certiorari was granted on October 12, 1942 to review a decision of the Circuit Court of Appeals for the Fifth Circuit in admiralty reversing, with one dissent, a decree of the District Court for Eastern Louisiana, and dismissing petitioner's libel against steamship *Eglantine*.

The opinion of the Circuit Court of Appeals (R. 54-7) is reported at 127 F. (2d) 569 and that of the District Court (R. 44-9) at 38 F. Supp. 658.

Statement

This case arises out of a collision between petitioner's steamship *Brazos* and steamship *Eglantine* on December 21, 1932. At that time the *Eglantine* was owned by respondent and was operated as a merchant vessel (R. 18). On December 23, 1932 petitioner filed in the District Court for Southern New York a petition for limitation of liability

in which respondent duly appeared and made claim for the *Eglantine's* damages. The District Court held both vessels at fault. Respondent appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed. Thereafter petitioner and respondent stipulated the damages, it being agreed that the *Brazos'* damages exceeded the *Eglantine's* (R. 19). Meantime the *Eglantine* was sold by respondent to Lykes Bros.-Ripley Steamship Co. Inc. Thereafter on June 10, 1937 petitioner filed its libel in the District Court for Eastern Louisiana against the *Eglantine in rem* to recover one-half the difference between the *Brazos'* and the *Eglantine's* damages (R. 1-4). Process issued and the *Eglantine* was seized but was released without bond upon respondent's suggestion that it was a party at interest (R. 4-8).

After its intervention in petitioner's suit against the *Eglantine in rem*, respondent raised the defense that the suit was not brought within the two year statute of limitations contained in §5 of the Suits in Admiralty Act of March 9, 1920, 41 Stat. 526, 46 U. S. Code, §745. The case was tried upon stipulated facts (R. 18-19).

The Decisions Below

The District Court held (R. 44-9) that a lien accrued in favor of petitioner against the *Eglantine in rem* when the collision occurred, that this suit is against the privately owned *Eglantine in rem* and not against the United States and that the two year limitation in the Suits in Admiralty Act does not apply. It entered a decree in favor of petitioner for one-half the difference between the *Brazos'* and the *Eglantine's* damages (R. 49).

The Circuit Court of Appeals disregarded petitioner's collision lien, brushed aside the fact that this is not a suit against the United States but one against the privately owned *Eglantine in rem*, held that the cause of action was created by the Suits in Admiralty Act and applied the two year limitation of that Act (R. 54-7). Accordingly it reversed (R. 58).

Hutcheson, C. J. dissenting (R. 57).

Statutes Involved

§9, Shipping Act of 1916, 46 U. S. Code §808.

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. *Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner*, in whole or in part, or hold any mortgage, lien, or other interest therein" (italics ours).

§§4, 5, Suits in Admiralty Act, March 9, 1920, 46 U. S. Code §§744, 745.

"§744. *Release of privately owned vessel after seizure.* If a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accord-

ance with the provisions of this chapter. (Mar. 9, 1920, c. 95, §4, 41 Stat. 526.)

§745. *Causes of action on which suits may be brought; limitations.* Suits as herein authorized shall be brought within two years after the cause of action arises." (Mar. 9, 1920, c. 95, §5, 41 Stat. 526.)

Question Presented

Does the two-year statute of limitations contained in §5 of the Suits in Admiralty Act limit the time within which suit may be brought against a privately owned vessel to recover for collision damage that occurred while such vessel was owned by the United States and employed as merchant vessel?

POINTS

I. The Court below erred in holding that petitioner's cause of action existed by virtue of the Suits in Admiralty Act.

The Circuit Court of Appeals held:

"The sovereign immunity of the United States having been waived, an action for tort arose; and the Suits in Admiralty Act was the only law by which this result was accomplished. Therefore, the cause of action existed by virtue of the Suits in Admiralty Act, was authorized only by that Act, and could not have been effectively prosecuted but for the provisions of that Act. * * * It thus appears that the cause of action here sued upon was created by virtue of the Suits in Admiralty Act; * * *" (R. 56-7).

This decision is the basis of the error in the Court below. Petitioner's cause of action was not created by

the Suits in Admiralty Act, but rather by the Shipping Act of 1916.

Section 9 of the Shipping Act of 1916 (*supra*, p. 3) provides that merchant vessels of the United States

"* * * shall be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part * * *".

In *The Lake Monroe*, 250 U. S. 246, this Court expressly held that by virtue of §9 of the Shipping Act of 1916 a collision lien arose against a vessel owned by the United States operated as a merchant vessel. The *Lake Monroe*, owned by the United States and operated as a merchant vessel, was in collision with the *Hellena*. The owners of the *Hellena* filed a libel against the *Lake Monroe in rem* and caused her to be seized by the United States Marshal under process issued pursuant to such libel. The United States applied to this Court for a writ of prohibition. The petition was dismissed, this Court holding that a collision lien arose, notwithstanding ownership by the United States, by virtue of the above quoted provisions of §9 of the Shipping Act of 1916.

In *Eastern Transportation Company* v. *United States*, 272 U. S. 675, this Court, referring to the Shipping Act of 1916 said:

"By §9, any such vessel while employed solely as a merchant vessel was made subject to all laws, regulations and liabilities governing merchant vessels, when the United States was interested therein as owner in whole or in part, or otherwise. It was under this provision that vessels belonging to the United States engaged as merchant vessels were arrested and held in an action *in rem*. In *The Lake*

Monroe, 250 U. S. 246, we decided that such a merchant vessel was subject to judicial process in admiralty for the consequences of a collision" (pages 688-9).

Section 9 of the Shipping Act of 1916 was not repealed by the Suits in Admiralty Act. It appears today as §808 of Title 46 of the United States Code. Indeed, it was reenacted, with some amendment unimportant here, by §18 of the Act of June 5, 1920, c. 250, 41 Stat. 994, less than three months after the passage of the Suits in Admiralty Act.

The purpose of the Suits in Admiralty Act was to relieve the United States of the inconvenience and delay resulting from the liability of its merchant vessels to seizure.

In *Blamberg Brothers* v. *United States*, 260 U. S. 452, this Court said of the Suits in Admiralty Act:

"This act was passed to avoid the embarrassment to which the Government found itself subjected by the Act of September 7, 1916, c. 451, 39 Stat. 728, by the 9th section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime liens. *The Lake Monroe*, 250 U. S. 246" (p. 458).

In *Eastern Transportation Company* v. *United States*, 272 U. S. 675, *supra*, this Court said:

"• • • the substitution by the Suits in Admiralty Act was merely to furnish a balancing consideration for the immunity of the United States from seizure of its vessels employed as merchant vessels previously permitted • • •" (p. 686).

There is nothing in the Suits in Admiralty Act or the decisions construing it that indicates a purpose to abolish

the collision lien against merchant vessels of the United States.

Below, respondent referred to *The Western Maid*, 257 U. S. 419, and argued against the existence of a collision lien. But *The Western Maid* dealt with public, not merchant, vessels of the United States. That decision involved three collisions in each of which the Government vessel was a public vessel. The *Western Maid* was operated by the Army Transport Service and was manned by a Navy crew. The *Liberty* was a pilot boat manned by a Navy crew. The *Carolina* was in the Army Transport Service and was manned by an Army crew. This Court was careful to point out, at pages 431-2, that these were public not merchant vessels. Section 9 of the Shipping Act of 1916 relates to merchant vessels, not public vessels, and it is Section 9 that gives rise to the collision lien against merchant vessels of the United States. All that this Court held in *The Western Maid* in this connection was that since there is under the statute law, no counterpart of Section 9 of the Shipping Act of 1916 as relates to public vessels no collision lien arises as to public vessels.

II. The two-year limitation of the Suits in Admiralty Act does not apply to this suit.

This is not a suit against the United States. It is a suit against a privately owned vessel *in rem* based upon a collision lien. The United States has voluntarily intervened in the suit—see libel (R. 1-4) and respondent's intervention (R. 5-7). Because petitioner had a collision lien against the *Eglantine*, and because the *Eglantine* was privately owned, petitioner brought this suit against

the *Eglantine in rem*. Petitioner did not sue the United States and did not need or resort to the waiver of sovereign immunity afforded by the Suits in Admiralty Act. Until the United States voluntarily intervened, this was a suit between private parties. The two-year limitation of Section 5 does not apply in these circumstances. Section 5 provides:

"Suits as herein authorized shall be brought within two years after the cause of action arises."

The critical words are "Suits as herein authorized". Since this is not a suit against the United States but one against the privately owned *Eglantine in rem*, it is not a "suit as herein authorized" and by its terms Section 5 does not apply. Two prior decisions, the only prior decisions on the point, both expressly so decide.

In *The Bascobal*, 295 Fed. 299 (C. C. A. 5) the Berwind-White Coal Mining Company libeled tug *Bâscobal* for the loss of coal shipped on board the barge *Richmond*, in tow of the *Bascobal*. The loss occurred while the *Bascobal* was owned by the United States and operated as a merchant vessel, but when the libel was filed the *Bascobal* had been sold and was privately owned. The suit was brought after the expiration of the time limitation in Section 5 and the *Bascobal* was seized under process but was released upon the intervention of the United States. The Court held that the Suits in Admiralty Act relates to suits against the United States, not to suits against privately owned vessels, even though they be upon causes of action that accrued while the vessel concerned was owned by the United States. The Court expressly held that Section 5 does not apply to this situation, saying:

"The above-quoted language of Section 5 of the Act shows that its provision as to the time within which suits shall be brought was intended to apply only to 'suits as herein authorized'. The suits which the Act authorizes do not include a libel against a merchant vessel or a tug which, at the time the libel is filed, is privately owned and operated and subject to arrest and seizure" (p. 301).

In *The Caddo*, 285 Fed. 643 (S. D. N. Y.; A. N. Hand, D. J.), barge *Caddo* was struck by tug *Retriever* (renamed *M. Moran*) while the tug was owned by the United States and operated as a merchant vessel. After the lapse of the time limitation provided by Section 5 of the Suits in Admiralty Act, and after the tug had been sold to private owners, she was libeled *in rem* and seized in a suit to recover the *Caddo's* collision damage. The United States intervened and excepted to the libel on the ground that it was not brought within the time limitation of Section 5. The Court held that Section 5 is not applicable to such a situation because a suit against a privately owned vessel upon a cause of action that arose during Government ownership is not one of the "suits as herein authorized."

The existence of Section 4 of the Suits in Admiralty Act (quoted *supra*, p. 3) indicates that the Congress did not intend the time limitation of Section 5 to apply where the Government vessel has been sold to private interests. Section 4 provides that where a privately owned vessel is seized upon a cause of action that arose during Government ownership and operation as a merchant vessel, it shall be released without bond upon suggestion of the interest of the United States

"* * * and *thereafter* such cause shall proceed against the United States in accordance with the provisions of this chapter."

In other words, since the limitation provided by Section 5 is directed towards the institution of suit, and since suits against privately owned vessels upon a cause of action that arose during Government ownership need proceed in accordance with the Act only *after* suit has been instituted and the Government has intervened, the limitation of Section 5 is inapplicable.

The Act itself contains by definition substantial evidence that this is not one of the "suits as herein authorized" by the Act—and it is only to "suits as herein authorized" that the time limitation of Section 5 applies. Section 8 of the Act provides:

"Any final judgment rendered in any suit herein authorized, and any final judgment within the purview of Section 744 (Section 4 of the Act) * * * shall * * * be paid by the proper accounting officers of the United States * * *" (41 Stat. 527; Title 46, U. S. Code, Section 748).

This section provides for the payment of judgments in the various classes of cases to which the Act relates. One class is "any suit herein authorized", *i. e.* a suit in personam against the United States. Another class is "any final judgment within the purview of Section 744 [Section 4 of the Act]", *i. e.* a suit against a privately owned vessel upon a cause of action arising during prior Government ownership in which the United States has intervened. The Congress, therefore, plainly had in mind that a judgment obtained in the kind of suit to which Section 4 applies is not one of the "suits as herein authorized". If a suit to which Section 4 applies (this suit) were one of the "suits as herein authorized" it would not have been *separately* referred to in Section 8 as one of the classes of cases

in which judgments were to be paid by the proper accounting officers of the United States.

Respondent contended below that the Suits in Admiralty Act affords the exclusive remedy upon maritime claims against the United States and argued that this suit is therefore barred. This argument overlooks the fact that this is not a suit against the United States but one into which the United States has gratuitously injected itself and cut off appellee's private claim against a privately owned vessel. The argument also overlooks the fact that the Suits in Admiralty Act, by Section 4, expressly contemplates the possibility of such a suit as this, not a suit against the United States, and provides a method by means of which the United States may take over the defense.

The decisions of this Court, relied upon below by the respondent, are not determinative and do not even touch the question presented here. Quotations from the opinions should not be considered apart from the questions actually presented and decided. In *United States Shipping Board Emergency Fleet Corporation* v. *Rosenberg Bros. & Company*, 276 U. S. 202, admiralty suits had been brought against the Emergency Fleet Corporation. Of the question presented for decision, this Court said:

"And the question here presented as to the effect of the [Suits in Admiralty] Act is whether, as the Fleet Corporation contends, the remedy given against it by a libel *in personam* in admiralty under the provisions of the Act, is exclusive; or whether, as the libelants contend, this remedy is not exclusive and the Fleet Corporation may also, as a private corporation, be sued in admiralty by a libel *in personam*, independently of the provisions of the Act" (p. 212).

All that the Court decided was that suits against the Emergency Fleet Corporation can be brought only under the Suits in Admiralty Act.

In *Federal Sugar Refining Co.* v. *United States*, 30 F. (2d) 254 (C. C. A. 2), no question was presented the decision of which is relevant here. Libellant's property, shipped on board a vessel owned by the United States, was damaged. Suit was brought against the United States under the Tucker Act more than two years after the cause of action arose. The only question was whether a suit against the United States under the Tucker Act could be brought after the enactment of the Suits in Admiralty Act.

That case, with others, was decided by this Court *sub nomine*, *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320. The *Johnson* case was an *action at law* brought against the Emergency Fleet Corporation in the courts of New York to recover damages for personal injuries. The *Lustgarten* case was an *action at law* brought against the Fleet Corporation in the District Court for Southern New York to recover for personal injuries. The *Royal Insurance Company* cases were *actions at law* against the Emergency Fleet Corporation in the courts of New York State to recover for loss and damage to cargo. Obviously none of these cases presented any question relevant to the suit at bar. The Fleet Corporation is not a party to this suit, nor is this suit either an action at law or a suit under the Tucker Act.

Eastern Transportation Company v. *United States*, 272 U. S. 675, does not consider whether the Suits in Admiralty Act is exclusive and holds only that the Act authorizes suits *in personam* in cases where there is no cause of action *in rem*.

By Section 9 of the Shipping Act of 1916 Congress determined upon the policy to be followed by the United States as concerns the liability of its merchant vessels. The policy adopted was that such vessels "shall be subject to all laws, regulations, and liabilities governing merchant vessels". At that time, Congress did not see fit to go beyond the inauguration of *in rem* liability. However, when the inconvenience arising from Section 9 of the Shipping Act of 1916 was brought home by the decision of this Court in *The Lake Monroe, supra*, Congress passed the Suits in Admiralty Act. Nowhere in that Act does Congress cut down the liabilities of merchant vessels provided for by Section 9 of the Shipping Act of 1916. The obvious purpose was to cut off only one of the incidents of *in rem* liability, *i. e.* seizure while in Government possession. To that end Congress provided for suits *in personam* and forbade the seizure of Government owned merchant vessels. The very existence of Section 4, making provision for the intervention of the United States in suits brought against privately owned vessels upon causes of action arising out of prior Government ownership, establishes beyond doubt that Congress had no intention of cutting down the effect of Section 9 of the Shipping Act of 1916, except only to circumvent the seizure of merchant vessels in the Government's possession.

Suits such as the one at bar were "authorized", by virtue of Section 9 of the Shipping Act of 1916. The Suits in Admiralty Act authorized only suits *in personam* against the United States. The time limitation of Section 5 is applicable only to "suits as herein authorized". It is not applicable to this case. By its decision below the Circuit Court, construing the Suits in Admiralty Act (which

has no relation to this suit whatever except to the extent that it authorized Government intervention), amended Section 9 of the Shipping Act of 1916 by adding thereto a statute of limitations where Congress saw fit to provide for no such statute but to rely upon the ordinary rules of laches obtaining between private parties.

There is, of course, no question of laches, or of the merits of petitioner's claim. The *Eglantine* had her day in Court in the limitation proceeding and, after a full and fair trial and after an appeal, both vessels were held at fault. The delay in bringing this suit has not prejudiced the United States in the slightest because the mutual fault of the *Eglantine* was fixed in timely litigation. The damages of the two vessels were stipulated and upon familiar principles the *Brazos* is entitled to recover from the *Eglantine* one-half the difference between their respective damages to the end that the mutual fault decision will result in each vessel bearing one-half the total damages.

III. The decree of the Circuit Court of Appeals should be reversed and the decree of the District Court reinstated, with costs.

Respectfully submitted,

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

Dated: New York, N. Y., November 2, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 265

CLYDE-MALLORY LINES,

Libellant-Petitioner,

v.

STEAMSHIP EGLANTINE

UNITED STATES OF AMERICA,

Intervenor-Respondent.

REPLY BRIEF FOR PETITIONER

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CITATIONS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

CLYDE-MALLORY LINES,
Libellant-Petitioner,

v.

Steamship EGLANTINE,
UNITED STATES OF AMERICA,
Intervenor-Respondent.

No. 265.

REPLY BRIEF FOR PETITIONER

This is not a suit against the United States. It is a suit against a privately owned vessel *in rem* based upon a collision lien. In admiralty the vessel is herself regarded as the legal entity and is a wrongdoer separate and apart from her owner. This is well settled by a long line of cases.

The China, 7 Wall. 53, 68.
The John G. Stevens, 170 U. S. 113, 120.
The Barnstable, 181 U. S. 464, 467.

Petitioner did not need or resort to the waiver of immunity afforded by the Suits in Admiralty Act. Until the United States voluntarily intervened, this was a suit between private parties (Petitioner's main brief, p. 8).

Respondent relies upon *The Western Maid*, 257 U. S. 419. That case dealt with public, not merchant vessels of the United States (our main brief, p. 7). The Court was particular to point out that the vessels involved "were employed for public and Government purposes, and were owned *pro hac vice* by the United States" (Opinion, p. 431).

Berizzi Brothers Company v. *Steamship Pesaro*, 271 U. S. 562, is not in point. There the *Pesaro* was owned and possessed by a friendly foreign government. The libel was *in rem* on a claim for damages arising out of a failure to deliver certain cargo. The vessel was arrested upon the usual process and released on bond. In the libel the vessel was described as a general ship engaged in common carriage of merchandise for hire. The Italian Ambassador to the United States filed a suggestion that the vessel was immune from process of the Courts. It was stipulated that the vessel when arrested was owned, possessed and controlled by the Italian Government and the plea of immunity was granted. The question decided by this Court was whether a ship owned and possessed by a foreign government and operated by it in the carriage of merchandise for hire is immune from arrest under process based upon a libel *in rem* by a private suitor. This Court held that the District Court rightly dismissed the libel for want of jurisdiction upon the ground that merchant ships owned and operated by a foreign government have the same immunity that warships have.

In *In re United States Steel Products Company* (*Steel Inventor-Woolsey*), 24 F. (2d) 657, 660 (C. C. A. 2), a collision between steamship *Steel Inventor* and destroyer *Woolsey*, it was contended that the appellants should have proceeded under the Public Vessels Act of 1925, and that by the provisions of that act the appellants were barred for failure to proceed within the one-year limitation named in the act. The Court said:

"Section 5 of the Act approved March 9, 1920 (46 USCA § 745; Comp. St. § 1251 1/4d) provides that suits as 'herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on

causes of action arising prior to the taking effect of this act shall be brought within one year after this act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.' The argument is that this provision is incorporated by reference into the act of 1925 and provides a one-year limitation for causes of action arising before its passage" (p. 660).

The Court went on to say that the statute applies only where an action is brought under the act, and as the action was not brought under the act, the statutory period provided for was not applicable (p. 660).

And the Court held that the remedy was not exclusive, saying:

"Nor does the act of 1925 provide an exclusive remedy. It provides that a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States for damages caused by a public vessel of the United States, and for compensation for towage and salvage service, including the contract salvage rendered to a public vessel of the United States. 43 Stat. 1112 (46 USCA §§ 781-790; Comp. St. §§ 1251¾—1 to 1251¾—10). A cross-libel is provided for by section 3. But such a cross-libel is permitted where the United States waives its immunity and files its cross-libel. The Thekla, supra. The section does not require the procedure, but permits it merely by filing a cross-libel" (pp. 660-61).

In *The Lake Monroe*, 250 U. S. 746 (our main brief, p. 5), this Court expressly held that § 9 of the Shipping Act of 1916 gives rise to a collision lien where a merchant vessel is concerned. Respondent contends that § 9 was repealed by the Suits in Admiralty Act, saying:

"Shortly after the decision in *The Lake Monroe*, the Suits in Admiralty Act was reported by the Senate Committee on Commerce for the express purpose of withdrawing the consent of the United States to the seizure of its vessels (pp. 10 and 11).

This statement of the purpose is precisely correct. It was the seizure while in Government possession, not the creation of the lien, that Congress aimed to avoid. *Blamberg Bros. v. United States*, 260 U. S. 452, 458; *The Isonomia*, 285 Fed. 516, 519 (C. C. A. 2).

The purpose is perfectly plain from the language of the Act itself. Nowhere are there words that abolish lien liability. The first section provides that no vessel owned by the United States shall "be subject to arrest or seizure". Section 3 provides that suits *in personam*, allowed in substitution for suits based upon seizure *in rem*; shall proceed as in like cases between private parties, *allowing libellant to elect to proceed as in rem*. Language better calculated to preserve the lien in all its aspects, except seizure to obtain security, can scarcely be imagined. Respondent cannot deny that the United States remains liable as *in rem* in a suit brought *in personam* under the Suits in Admiralty Act. Plainly the purpose was to preserve all the incidents of *in rem* liability excepting only seizure.

Respondent's argument that the re-enactment of § 9 of the Shipping Act of 1916 by § 18 of the Merchant Marine Act of 1920 cannot be viewed as intended to nullify the objective of the Suits in Admiralty Act is based upon an erroneous view as to what that objective was. If it be understood that the objective of the Suits in Admiralty Act was to prevent only the seizure of vessels while in Government possession, there is no inconsistency.

This Court's decision in *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, is not helpful here for the reasons stated at page 12 of our main brief and because no question of lien was involved. Respondent's argument that it is even clearer in this case than in the *Johnson* case that the Suits in Ad-

miralty Act is exclusive, wholly overlooks § 4. If Congress had aimed to exclude such a suit as this how can any meaning whatever be given to § 4, which expressly makes provision for Government intervention in a suit against a privately owned vessel upon a lien arising during Government ownership?

Respondent argues that § 4 was included because Congress was mistaken as to the law in regard to the existence of liens. But Congress was not mistaken. It expressly created such liens by § 9 of the Shipping Act of 1916 and reiterated its creation of such liens by re-enacting § 9 in § 18 of the Merchant Marine Act of 1920.

Respondent's entire difficulty on this point stems from its failure to understand that the purpose of the Suits in Admiralty Act was, so far as lien liability is concerned, merely to prevent the seizure of vessels in Government possession and not to interfere with any of the other aspects of lien liability. Until Congress amends § 9 of the Shipping Act of 1916—and it has had long opportunity to do so if *The Bascobal*, 295 Fed. 299, was wrongly decided—liens do arise when Government vessels are in collision.

Respondent asserts that our argument is "verbal" and that the language of § 5 as chosen by Congress does not support us. Respondent overlooks the substance of our argument which applies as well to the language of "other suits hereunder" as to the language of "suits as herein authorized". The Suits in Admiralty Act authorized suits against the United States *in personam* and provided a two-year limitation as to such suits, i.e., "suits hereunder". This is not a suit *in personam* against the United States but a suit against a privately owned vessel.

Respondent's difficulty arises from its attempt to apply to a suit *in rem* based upon a lien arising under § 9 of the Shipping Act of 1916 a limitation directed against suits *in personam* authorized by the Act of March 9, 1920.

Respondent's argument that Congress cannot have intended § 5 to apply only to suits *in personam* overlooks the purpose of § 9 of the Shipping Act of 1916 which was to place Government merchant vessels on a parity generally with privately owned vessels. In this statute Congress was content to allow the ordinary rule of laches applicable between private parties to control.

If, as respondent intimates, a reversal of *The Bascobal*, 295 Fed. 299 (C. C. A. 5), and *The Caddo*, 285 Fed. 643, is necessary after twenty years to protect the saleability of the Government's merchant vessels after the war, we suggest that appropriate representation to Congress would result in an early and satisfactory modification of the statute without injury to the petitioner, whereas to affirm the decision below will be tantamount to a retroactive amendment of the statute, leaving petitioner without recourse to recover the amount which respondent does not deny is in good conscience due.

Respectfully submitted,

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

Dated, New York, N. Y., November 25, 1942.

FILE COPY

No. 265

In the Supreme Court of the United States

OCTOBER TERM, 1942

CLYDE-MALLORY LINES, PETITIONER

v.

STEAMSHIP "EGLANTINE," UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

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MEMORANDUM FOR THE RESPONDENT

Petitioner brought this suit in the District Court of the United States for the Eastern District of Louisiana on June 10, 1937, by filing a libel against the steamship *Eglantine* to recover one-half the difference between the damages sustained by petitioner's steamship *Brazos* and the damages sustained by the *Eglantine* in a collision for which both vessels were at fault as has been adjudicated in other litigation (R. 4–8, 30). The collision occurred December 21, 1932, when the *Eglantine* was owned and operated by the United States as a merchant vessel (R. 29). Subsequent

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to the collision and prior to the institution of the present suit the United States sold the *Eglantine* to Lykes Bros.-Ripley Steamship Co., Inc., the owner on the date of suit [1] (R. 29–30).

A warrant for attachment of the *Eglantine* was issued on the date the present suit was brought and the vessel was seized forthwith by the marshal (R. 9–10). On the same date, pursuant to Section 4 of the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. § 744), the United States filed a suggestion that it was interested in the cause and desired the release of the vessel. Thereupon she was released by order of the District Court (R. 13). In its suggestion the United States assumed liability for the satisfaction of any decree which might be obtained in the cause, but reserved the defense based on the provision of Section 5 of the Act that "Suits as herein authorized shall be brought within two years after the cause of action arises" (R. 11–12). Thereafter, on June 14, 1937, the United States filed an exception to the libel praying that the libel be dismissed on the ground that it was not filed in compliance with Section 5. The District Court overruled the exception (R. 16). Subsequently it heard the case upon a stipulation of facts (R. 32–

[1] The date of the sale is not more specifically shown by the record. In the court below, however, the Government offered to stipulate that the date was April 13, 1933, which was well within the two-year period of limitation for bringing suit. Brief on behalf of the United States, pages 2, 4.

62, 68) and the pleadings, including the answer of the United States (R. 17–22) and petitioner's motion to strike the answer's allegations that the suit was barred by the two-year period of limitation and by laches (R. 26–28).

The District Court held that Section 5 was inapplicable because the suit was not authorized by the Suits in Admiralty Act. It held further that the suit was not barred by laches. On April 29, 1941, a decree was entered against the United States for $3,829.61 with interest and costs (R. 69–71).

On appeal the Circuit Court of Appeals for the Fifth Circuit reversed on the ground that Section 5 applies and that, therefore, the exception to the libel should have been sustained (R. 82–83).[2] In so holding, the court expressly declined to follow its previous decision in *The Bascobal*, 295 Fed. 299, and the decision of the District Court for the Southern District of New York in *The Caddo*, 285 Fed. 643. One judge dissented on the authority of the *Bascobal* case.

The decision of the court below is, we submit, correct under the decisions of this Court establishing that the Suits in Admiralty Act provides the exclusive remedy in admiralty against the

[2] The opinion of the Circuit Court of Appeals is reported in 127 F. (2d) 569. The opinion of the District Court is reported in 38 F. Supp. 658.

United States on all maritime causes of action arising out of the possession or operation of merchant vessels. *United States Shipping Board Emergency Fleet Corp.* v. *Rosenberg Bros.*, 276 U. S. 202; *Johnson* v. *United States Shipping Board Emergency Fleet Corp.*, 280 U. S. 320. See also *Federal Sugar Refining Co.* v. *United States*, 30 F. (2d) 254 (C. C. A. 2). Those decisions, which were relied on by the court below (R. 81–82), conflict with the reasoning adopted in *The Caddo*. Nevertheless, we do not oppose the granting of the petition for writ of certiorari.

The question involved is one of importance to the Government, as well as to private concerns, and it is not altogether free of doubt since this Court has not had occasion to determine the precise issue whether Section 5 applies in an *in rem* proceeding brought after the United States has sold the merchant ship to a private purchaser. Cf. *The Liberty*, 257 U. S. 419; *The Carolinian*, *id.* During the present emergency the Government has been acquiring by construction, purchase, and requisition hundreds of merchant vessels and will, no doubt, continue to do so until after the war. Eventually, in all probability, these vessels will be transferred to private owners and the question involved in this case will recur. In view of the importance to the Government of having the question authoritatively determined so that the liabilities

of the interested parties may be clearly understood when the transfers take place, the Government does not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

AUGUST 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 44–49) is reported in 38 F. Supp. 658. The opinion of the circuit court of appeals (R. 54–57) is reported in 127 F. (2d) 569.

JURISDICTION

The judgment of the circuit court of appeals (R. 58) was entered on April 29, 1942. A petition for rehearing was denied June 2, 1942 (R. 60). The petition for a writ of certiorari was filed on July 29, 1942, and was granted on October

12, 1942 (R. 61). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a libel *in rem* may be maintained against a privately owned vessel, for a collision occurring while the vessel was owned by, and operated as a merchant vessel of, the United States.

2. If so, whether Section 5 of the Suits in Admiralty Act requires that such a libel be brought within two years after the cause of action arises.

STATUTES INVOLVED

Section 9 of the Shipping Act of 1916 (39 Stat. 728, 730), Section 18 of the Merchant Marine Act of 1920 (41 Stat. 988, 994, 46 U. S. C. § 808), and the Suits in Admiralty Act of 1920 (41 Stat. 525–528, 46 U. S. C. §§ 741–752) are set forth in Appendix A, pp. 32–43, *infra*.

STATEMENT

This case arises out of a collision on December 21, 1932, between the Steamship *Brazos*, owned by petitioner, and the Steamship *Eglantine*, which was owned at the time of the collision by the United States and operated as a merchant vessel. In limitation of liability proceedings brought by the petitioner before the commencement of the present case it was determined that the collision

was caused by mutual fault, and the damages were fixed at $34,280.93 to the *Brazos* and $26,621.07 to the *Eglantine* (R. 2–3, 18–19, 33–36, 37–39). Between the date of the collision and the commencement of the present suit the United States sold the *Eglantine* (R. 1–2).[1]

The present suit was commenced by an ordinary libel *in rem* filed against the *Eglantine* on June 10, 1937, four and one-half years after the collision, to recover one-half the difference between the damages to the *Brazos* and the damages to the *Eglantine* (R. 1); and on the same day an admiralty warrant for attachment issued and the marshal seized the vessel (R. 4–5). On the same day the United States, under Section 4 of the Suits in Admiralty Act (46 U. S. C. 744), filed its suggestion for the release of the vessel, reserving the benefit of all exemptions and defenses (R. 5–7). Thereupon, the *Eglantine* was released (R. 7).

By appropriate pleadings the United States raised three defenses: (1) that petitioner could not attempt to impose lien liability upon the *Eglantine* for any incident which occurred while the vessel was owned and operated by the United States; (2) that petitioner's claim was barred by the two-year limitation established by Section 5 of

[1] The record does not show the precise date of the sale. In fact, it occurred on April 13, 1933.

the Suits in Admiralty Act, and (3) that the claim was barred by laches (R. 9, 12–13).[2]

All three defenses were overruled by the district court and a decree was entered awarding petitioner one-half the difference between the damages suffered by the *Brazos* and the damages suffered by the *Eglantine*. In its opinion the district court held on the authority of *The Bascobal*, 295 Fed. 299 (C. C. A. 5), that the two-year period of limitations did not bar the suit because "it is a suit in rem against a vessel privately owned" (R. 46). The district court also held that the defense of laches was insufficient because the petitioner had proceeded promptly

[2] The issues were raised in the following manner: To the libel *in rem* (R. 1–4) the United States filed an exception on the ground that the libel showed on its face that it was not filed in accordance with Section 5 of the Suits in Admiralty Act (R. 8). The exception was overruled (R. 8–9). The United States, reserving all rights stated in its exception, then filed an answer pleading the three defenses summarized above (R. 12–13). The petitioner filed exceptions to the answer (R. 16–17) but the exceptions were not acted on by the district court until the final hearing. A stipulation of facts was then filed (R. 18–19). To it were attached the petition for limitation of liability filed by petitioner as owner of the *Brazos* in the Southern District of New York (Exh. A, R. 20–25), the claim and answer by the United States as owner of the *Eglantine* (Exh. B, C, R. 25–29), the interlocutory decree of the District Court for the Southern District of New York holding both vessels at fault for the collision (Exh. D, R. 29–33) and the final decree of that court upon a stipulation as to the amount of damages suffered by both vessels (Exh. E, R. 33–36).

to determine the issue of liability in the limitation of liability proceeding (R. 47–48).

On appeal the circuit of appeals reversed the decree of the district court on the ground that the two-year limitation prescribed by Section 5 of the Suits in Admiralty Act controlled, expressly refusing to follow its prior decision in *The Bascobal, supra* (R. 54–57). Judge Hutcheson dissented (R. 57).

SUMMARY OF ARGUMENT

I

It is settled by the decisions of this Court that a vessel is not liable *in rem* for torts committed by her while she was owned or operated by the United States. *The Western Maid,* 257 U. S. 419. Merchant vessels of the sovereign enjoy the same immunity. *Berizzi Brothers Company* v. *Steamship Pesaro,* 271 U. S. 562. Petitioner does not contest this principle but urges that the United States has waived this sovereign immunity in the case of its merchant vessels.

Under Section 9 of the Shipping Act of 1916 Government merchant vessels were liable to be attached for their torts. Section 9, however, was repealed *pro tanto* by the Suits in Admiralty Act of 1920 which was enacted for the very purpose of ending the expense and inconvenience arising from seizure of Government vessels to satisfy lien liability.

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Section 9 so far as it consented to libels *in rem* against the vessel was not reenacted by the Merchant Marine Act of 1920. Although it used the very words of Section 9, the latter Act must be read harmoniously with the Suits in Admiralty Act and not to nullify its purposes. Petitioner's argument that Section 9 was reenacted with all its original implications was made, and rejected by this Court, in *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320.

Nor can the necessary legislative license for petitioner's suit be gleaned from Section 4 of the Suits in Admiralty Act. Section 4 was included on the assumption of the draftsman—soon afterwards proved mistaken in *The Western Maid*, 257 U. S. 419—that the acts of a Government vessel gave rise to maritime liens against the vessel which became enforcible after her transfer to a private person. But the mistaken congressional assumption about lien liability should not be construed as a consent to lien liability; indeed such a construction was rejected in *The Western Maid*, 257 U. S. 419. Moreover, Section 4 of the Suits in Admiralty Act cannot be construed to lend any continued vitality to Section 9 of the Shipping Act of 1916, since Section 4 applies to a broader class of vessels than Section 9 and was clearly intended to meet the problem created by *The Siren*,

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7 Wall. 152, rather than the problem created by Section 9.

Even if the plaintiff could properly have asserted its claim by a timely libel *in rem* against the *Eglantine,* the libel in this proceeding should have been dismissed because it was not brought within two years after the cause of action arose, as required by Section 5 of the Suits in Admiralty Act. Although Congress in enacting Section 4 mistakenly assumed that a timely libel would lie, it intended by Section 5 to impose a two-year period of limitation on such suits as well as on suits brought directly against the United States. This intention is clear from the language of the Act and its legislative purpose and history. The present suit is barred by the doctrine laid down in *Johnson* v. *United States Shipping Board Emergency Fleet Corporation,* 280 U. S. 320, as a matter of exclusiveness of right, remedy, and time limitation of the Suits in Admiralty Act.

ARGUMENT

I

THE "EGLANTINE" IS NOT LIABLE *IN REM*

The libel *in rem* against the *Eglantine* clearly cannot be maintained in the absence of statutory sanction. At the time of the collision the vessel was owned by the United States and operated by

it as a merchant vessel. In *The Siren*, 7 Wall. 152, 154, 155, it was held that Government vessels were immune as sovereign property from seizure for *in rem* satisfaction of maritime liens, although the Court suggested that there might be an inchoate lien unenforcible during Government ownership but enforcible after a transfer of the vessel (pp. 155–158). In *The Western Maid*, 257 U. S. 419, however, that suggestion was rejected and the Court held squarely that, in the absence of a waiver of sovereign immunity, a libel *in rem* could not be maintained against a vessel for injuries done by it while owned or chartered and operated by the United States.[3] The English rule is the same. *The Tervaete* [1922] P. 259 (Court of Appeal); *The Sylvan Arrow* [1923], P. 14, 220. And although *The Western Maid* was engaged in the "public service" as distinguished from mercantile pursuits, it is clear that the same full measure of immunity extends to the sover-

[3] The opinion of Mr. Justice Holmes makes it entirely clear that the doctrine expounded in *The Western Maid* is quite distinct from the rule, discussed in *The Siren*, 7 Wall. 152, at 157–159, that *preexisting* liens are unenforcible during the Government's tenure but may later be enforced (*United States* v. *Alabama*, 313 U. S. 274) for he stated (257 U. S. at 432) "The only question really open to debate is whether a liability attached to the ships which although dormant while the United States was in possession became enforcible as soon as the vessels came into hands that could be sued." The distinction was expressly noted in *The Tervaete* [1922] P. 259, 265 (Court of Appeal).

eign's merchant vessels. Cf. *Berizzi Brothers Company* v. *Steamship Pesaro*, 271 U. S. 562; *Compania Espanola De Navegacion Maritima, S. A.* v. *The Navemar*, 303 U. S. 68, 74; *The Tervaete* [1922], P. 197, 198 (Admiralty); 259 (Court of Appeal).[4]

Petitioner does not controvert either the above principles or their applicability to the instant case if no statutory waiver of immunity is made out. Petitioner finds such a waiver in Section 9 of the Shipping Act of 1916. We shall show, however, (1) that Section 9 has been repealed, so far as it waived the immunity of the sovereign's property from liability *in rem*, (2) that no waiver can be spelled out of Section 18 of the Merchant Marine Act of 1920 and (3) that Section 4 of the Suits in Admiralty Act does not constitute such a waiver.

1. SECTION 9 OF THE SHIPPING ACT OF 1916 WAS REPEALED BY THE SUITS IN ADMIRALTY ACT OF 1920

Section 9 of the Shipping Act of 1916 provided in part (39 Stat. 728, 730):

> Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and

[4] The cited cases deal with vessels belonging to a foreign sovereign. The immunities of the United States in domestic courts must be at least as broad, if not broader. Cf. *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 132–136.

> license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. * * *

In *The Lake Monroe*, 250 U. S. 246, the Court held that a vessel documented in the name of the United States and operated by the United States Shipping Board could be libelled *in rem* by virtue of this section.[5]

But Section 9 does not authorize the petitioner's libel. Shortly after the decision in *The Lake Monroe*, *supra*, the Suits in Admiralty Act was reported by the Senate Committee on Commerce for the express purpose of withdrawing the con-

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[5] The fact that the Court relied exclusively on Section 9 supports our contention that in the absence of statute a libel *in rem* cannot be maintained against a government merchant vessel (see pp. 8-9, *supra*). The respondent in opposing the petition for certiorari, had cited, *inter alia*, *The Davis*, 10 Wall. 15, *Long* v. *The Tampico*, 16 Fed. 491 (S. D. N. Y.), and *The Johnson Lighterage Co., No. 24*, 231 Fed. 365 (N. J.), and argued at length that *The Lake Monroe* was liable to arrest and seizure irrespective of the Shipping Act of 1916, because she had been manned, equipped, and supplied by Randall & Company, as agents for the Shipping Board, and was operating for hire under charter by Randall & Company to another private concern, so that the Government was not in the actual possession essential to the exemption of sovereign property against judicial process (Br. in Opposition to Petition in No. 30, Original, October Term, 1918, pp. 11-20).

sent of the United States to the seizure of its vessels. S. Rep. 223, 66th Cong., 1st sess. The committee referred to the decision in *The Lake Monroe, supra,* as creating a situation in which the United States was subject to "unnecessary expense and its vessels to great delays," and explained that the bill met this situation "by providing specifically for suits in personam against the United States and expressly prohibits suits in rem against its merchant vessels" (*id.*, p. 3). See also H. Rep. 497, 66th Cong., 2d sess.; Hearing before the Committee on Commerce, U. S. Senate, 66th Cong., 1st Sess., on S. 2253, p. 7 (letter from the United States Shipping Board, which sponsored the measure, to Chairman Jones, Senate Committee on Commerce); *id.*, at pp. 8–12, 17, 30.

To this end, Section 1 of the Suits in Admiralty Act of 1920 flatly prohibits the arrest or seizure by judicial process, in the United States or its possessions, of any vessels owned, possessed, or operated by the United States or by its wholly owned corporations (other than the Panama Railroad Company); Section 2 permits a libel *in personam* to be brought against the United States or such corporations with respect to vessels employed by them as merchant vessels, in cases where an admiralty proceeding could be maintained if the vessels were privately owned and possessed; Section 3 prescribes the procedure for the litigation of

such libels against the United States; and Section 13 expressly repeals all inconsistent legislation. Manifestly, Congress thereby repealed Section 9 of the Shipping Act of 1916 so far as it subjected sovereign property to liability *in rem*. Plainer language could hardly have been used and the legislative history is unequivocal.[6] Indeed, in *Blamberg Brothers* v. *United States*, 260 U. S. 452, in a passage quoted by petitioner (Br. 6) this Court has already recognized that the purpose was to repeal the authorization of libels *in rem* under Section 9 of the Shipping Act of 1916 (p. 458):

> This act was passed to avoid the embarrassment to which the Government found itself subjected by the Act of September 7, 1916, c. 451, 39 Stat. 728, by the ninth section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of

[6] In addition to the citations in the text, *supra*, pp. 11–12, see also the testimony of the bill's draftsman before the House Committee which considered the legislation (Hearing before the Committee on the Judiciary, House of Representatives, 66th Cong., 1st sess., on H. R. 7124, pp. 4–17), and the Congressional debates on the measure. 59 Cong. Rec. 1680, 1686, 3631. As these references indicate, the measure had an additional purpose to extend the *in personam* liability of the United States, in connection with its merchant fleet, to situations in which the vessel would not have been liable *in rem* under Section 9 of the Shipping Act of 1916, in order that the Government might compete on equal terms with private operators for the carriage of the world's commerce. Cf. *Eastern Transportation Company* v. *United States*, 272 U. S. 675, 688 *et seq.*

maritime liens. *The Lake Monroe*, 250 U. S. 246. * * *

2. SECTION 18 OF THE MERCHANT MARINE ACT OF 1920 DOES NOT REINSTATE SECTION 9 OF THE SHIPPING ACT OF 1916 SO AS TO AUTHORIZE LIBELS *IN REM* AGAINST GOVERNMENT VESSELS

Section 18 of the Merchant Marine Act of 1920 included without change the provisions of Section 9 of the Shipping Act of 1916 (39 Stat. 728, 730, as amended, 40 Stat. 900, 41 Stat. 994, 46 U. S. C. 808). But this reenactment must be considered in the light of the Suits in Admiralty Act which had become law only three months previously; and it cannot be supposed that Congress intended so soon to nullify the objective of that statute. The withdrawal of the waiver of sovereign immunity from seizure of its property—which was the accomplishment of the Suits in Admiralty Act—left Section 9 of the Shipping Act in effect to impose upon vessels "purchased, chartered, or leased from the board" many other public and private obligations to passengers, shippers, crew, and other vessels, which are imposed both by common law and by statute, and which after the Suits in Admiralty Act were enforcible only as that Act prescribed. Cf. *Shewan & Sons* v. *United States*, 266 U. S. 108, 112; *Eastern Transportation Company* v. *United States*, 272 U. S. 675, 688–689. The reenactment in Section 18 of the Merchant Marine Act, therefore, has ample meaning without interpreting it to reenact a waiver of the sovereign immunity of Government vessels themselves from

liability *in rem*. And there is no more reason to suppose that Congress intended to make the waiver in the case of a vessel like the *Eglantine* than there is for holding that it intended to revive *The Lake Monroe*.

In *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, moreover, the Court rejected an argument very similar to that which petitioner makes. Section 33 of the Merchant Marine Act of 1920 provided that "any seamen who shall suffer personal injury, in the course of his employment may * * * maintain an action for damages at law, with the right of trial by jury" (41 Stat. 988, 1007, 46 U. S. C. 688). The seamen brought actions at law against the Fleet Corporation pointing to the generality of this language and emphasizing, as petitioner does in the instant case, that Section 18 of the Merchant Marine Act reenacted Section 9 of the Shipping Act of 1916 (Br. for petitioner Johnson and respondent Lustgarten, Nos. 5 and 32, October Term, 1929, pp. 34–37, 40–42). They also argued that this contention should prevail because the actions before the Court did not impede the purpose of the Suits in Admiralty Act to eliminate the expense caused by seizure of Government vessels (*Id.* at 42). The Court rejected the contention, saying (p. 327):

> We conclude that the remedies given by the [Suits in Admiralty] Act are exclusive in all cases where a libel might be filed under it. * * *

In the instant case it is even clearer that the remedy under the Suits in Admiralty Act is exclusive. In the *Johnson* case the actions were *in personam* but were at law; in the instant case the petitioner sought to proceed *in rem* against the vessel in reliance upon an alleged waiver of sovereign immunity, notwithstanding that the purpose of the Act was to prevent such arrest and seizure. Every consideration which impelled the decision in the *Johnson* case, therefore, applies with greater force to the present controversy.

3. SECTION 4 OF THE SUITS IN ADMIRALTY ACT DOES NOT WAIVE THE EGLANTINE'S IMMUNITY FROM *IN REM* LIABILITY

The only remaining statute which can be urged to be a waiver of the Eglantine's sovereign immunity from liability *in rem* is Section 4 of the Suits in Admiralty Act, which provides (41 Stat. 525, 526, 46 U. S. C. 744):

> if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States * * * that it is interested in such cause, desires such release, and assumes the liability * * * and thereafter such cause shall proceed

against the United States in accordance with the provisions of this Act.

When Section 4 was enacted, *The Western Maid*, 257 U. S. 419, had not been decided and the prevailing view, based upon certain language in *The Siren*, 7 Wall. 152, was that the torts of a Government vessel gave rise to an inchoate lien liability which became enforcible against the vessel after transfer by the sovereign. Section 4 takes account of this possibility. But it is plain that the section does not affirmatively create any lien liability by a waiver of sovereign immunity. Section 4 provides that if such a vessel is attached, the United States may at once obtain her release by assuming the liability; but it does not authorize the attachment. The evident purpose was to enable the United States to substitute its liability *in personam* for any liability *in rem* to which the vessel might be subject and that purpose is wholly inconsistent with an intent to waive any sovereign immunity which might exist. Thus, Section 4 left the question of lien liability precisely as it found it.

This interpretation of Section 4 is confirmed by its legislative history. The draftsman testified before the Senate Committee on Commerce. He referred to *The Siren* and described how under that decision a vessel formerly operated by the United States as a naval auxiliary had been libelled for damages done while she was operated by the United States, forcing the owner to give

a surety bond for the vessel's release and thereby adding the cost of the bond to the ultimate expense to be paid by the United States when the owner claimed indemnity. The draftsman then explained (Hearing before the Committee on Commerce, United States Senate, 66th Cong., 1st sess., on S. 2253, pp. 17–18):

> This section is designed to meet that situation.[3]

The purpose of Section 4, therefore, was to minimize the financial burden on the Government resulting from the inchoate lien liability which was mistakenly thought to exist for damage done by a Government vessel. To construe Section 4 to authorize a libel *in rem* against the vessel, such as petitioner's, would invert the provision to the financial disadvantage of the Government by reducing the selling value of its vessels (cf. *Plamals* v. *Pinar Del Rio*, 277 U. S. 151, 157; *The Caddo*, 285 Fed. 643, 644 (S. D. N. Y.); *The Tervaete* [1922] P. 259, 266, 271–272 (Court of Appeal).[4] The burden would be very heavy in

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[3] The pertinent portions of the testimony, summarized in the text, are set forth in full in Appendix B, pp. 43–46, *infra*.

[4] Section 4 was designed to permit merely the optional filing of a suggestion (see Hearing before the Committee on Commerce, United States Senate, 66th Cong., 1st sess., on S. 2253, p. 18; 59 Cong. Rec. 1756; cf. *The Caddo*, 285 Fed. 643, 645 (S. D. N. Y.)), a fact which would still further reduce the selling value if the libel *in rem* could be asserted.

The rejection of lien liability under the circumstances here involved would also promote the accomplishment of

periods during which the Government was disposing of the great numbers of vessels acquired during wartime.

The decision in *The Western Maid*, moreover, is a controlling precedent that no lien liability attached to the *Eglantine* in the instant case notwithstanding the provisions of Section 4. Under

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the exclusiveness of remedy and the uniformity of administration under the Suits in Admiralty Act, the importance of which was stressed in *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, 326–327, and *Fleet Corp.* v. *Rosenberg Bros.*, 276 U. S. 202, 213. The rejection of such liability would require all suits against the Government and the affected corporations, arising out of their operation of merchant vessels, to begin and proceed directly in the manner basically intended by the statute. It would also avoid the possibility of double litigation which would exist, if such lien liability were to be recognized, where the Government has transferred a vessel with a warranty of unencumbered title (see Hearing before the Committee on the Judiciary, House of Representatives, 68th Cong., 1st sess., on H. R. 9057, p. 31) and a claim is thereafter asserted against the vessel. In such a case, if the United States, at least after notice of the claim, omitted or neglected to take over the defense under Section 4, a subsequent suit on the warranty could doubtless be brought against the Government, if the claim were upheld—and not only for the amount of the judgment, but also for the costs of the prior suit, including counsel fees. Cf. *Charles John House* v. *United States*, 39 C. Cls. 508., *Brand* v. *United States*, 5 C. Cls. 312. Any delay or failure of the Government to obtain release of the vessel might also give rise to detention damages recoverable on the warranty. Cf. *The Conqueror*, 166 U. S. 110, 125 *et seq.* The acceptance of our view would thus in fact close the one remaining gap in the desired uniformity of administration under an exclusive remedy.

The Siren the inchoate liens were mistakenly supposed to attach to merchant and "public" vessels. Section 4 was not limited in its application to merchant vessels but applied also to "public" vessels (Appendix B, pp. 44–46). Both these points were brought to the Court's attention in *The Western Maid*, involving three "public" vessels, thus opening the way for the argument that Section 4 gave legislative approval to the inchoate lien doctrine (Br. on Behalf of Hon. John C. Rose, in No. 23, Original, October Term 1921, pp. 42–45). And in the instances of two of the vessels, the United States had proceeded under Section 4 to obtain their release. Nevertheless, with Section 4 thus squarely before it, the Court held that the vessels were not liable *in rem*.

The force of this decision cannot be avoided by any suggestion that Section 4 is an indication that Section 9 of the Shipping Act was to have continued vitality as a waiver of sovereign immunity. That Section 4 was in no sense predicated upon liabilities created by Section 9 of the Shipping Act of 1916, but was designed solely to meet the problem supposed to arise from *The Siren*, is clear from the fact that Section 4 was intended to apply to a broader class of vessels than Section 9 embraced. The latter was limited to vessels "purchased, chartered, or leased from the [Shipping] board." In contrast, Section 4, was not so

limited but covers any vessel previously in the "possession, ownership, or operation" of the Government and whether as a merchant or "public" vessel. Likewise, the legislative history makes clear that Section 4 was designed to meet the situation resulting from *The Siren* and not the situation resulting from the waiver of liability in Section 9 of the Shipping Act, which was being cured by its partial repeal (see pp. 16–17, *supra*). Moreover, maritime liens are *stricti juris* and will not be extended by construction. *Plamals* v. *Pinar Del Rio*, 277 U. S. 151, 156; *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, 260 U. S. 490, 499; *Vandewater* v. *Mills, Claimant Steamship Yankee Blade*, 19 How. 82, 89.[9]

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[9] Nothing in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, is opposed to our view that the existence of lien liability should be controlled by *The Western Maid*, decided after the passage of the Suits in Admiralty Act, rather than by *The Siren*, which was decided prior to its enactment, but which was overruled in this connection by *The Western Maid*. In the *Motor Boat Sales* case, the Court was considering the construction of a statute intended to impose *affirmative* liability to the full constitutional limit delineated by prior judicial decisions; whereas the present case concerns a negative provision intended, not to impose liability, but to protect against a supposed liability, soon afterwards proved to be nonexistent. Further, in the present case *The Siren* has long since been overruled; in the *Motor Boat Sales* case the Court was there being asked to overrule long-standing precedents. Moreover, as the Court noted in that case, the rejection of the "Jensen and its companion cases" would have introduced an objectionable uncertainty as to the scope of the protection that Congress wished to provide by the "uniform compensa-

For the foregoing reasons we submit that the *Eglantine* was not subject to lien liability and that the libel *in rem* against the vessel cannot be maintained. Acceptance of our contention would place no hardship upon persons injured by Government vessels. They would have their remedy under the Suits in Admiralty Act even if no lien liability had existed.[10] Cf. *Eastern Transportation Company* v. *United States*, 272 U. S. 675.

II

PETITIONER'S LIBEL IS BARRED BY THE TWO-YEAR PERIOD OF LIMITITIONS UNDER SECTION 5 OF THE SUITS IN ADMIRALTY ACT

In the preceding section we have shown that the *Eglantine* was not liable *in rem* and that petitioner's remedy was to proceed under the Suits in Admiralty Act against the United States. In the

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tion statute" (314 U. S. at 249, 250), contemplated in the Longshoremen's and Harbor Workers' Compensation Act. In this case the whole purpose of the Suits in Admiralty Act, particularly with respect to the important matter of uniformity, would be served by following *The Western Maid* and holding that there is no lien liability.

[10] Although a limitation of liability proceeding is defensive in nature, so that the petitioner could not "recover a dollar by means of it from anybody" (*Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corporation*, 86 F. (2d) 708, 710 (C. C. A. 2)), it could have brought a timely affirmative action for damages along with its petition for limitation of liability. See *The Albert Dumois*, 177 U. S. 240, 241–242, 255–256; *The Manitoba*, 122 U. S. 97, 98–101; *The Bleakley No. 76*, 54 F. (2d) 530 (C. C. A. 2), and 56 F. (2d) 1037 (S. D. N. Y.).

present section we assume *arguendo* that liability *in rem* exists by virtue of Section 9 of the Shipping Act of 1916 and Section 18 of the Merchant Marine Act of 1920 or under Section 4 of the Suits in Admiralty Act. We shall show that even upon that assumption the libel *in rem* must be dismissed because Section 5 of the Suits in Admiralty Act bars such a libel after a two-year period; petitioner's libel was not filed until four and one-half years after the collision (R. 1, 18–19).

Petitioner's argument on this issue is verbal. As carried into the United States Code, Section 5 requires "Suits as herein authorized" to be brought within two years after the cause of action arises (46 U. S. C. 745). Section 8, which provides for payment of judgments and arbitration awards, makes separate reference to any "judgment rendered in any suits herein authorized, and any judgment within the purview of sections 4 * * *." The instant case is a suit within the purview of Section 4 and therefore petitioner urges that it is not a "suit herein authorized."

But the argument from these words is unpersuasive of the intention of Congress because the words "herein authorized" were not its own words in this connection. As Section 5 was enacted by Congress it provided (41 Stat. 526):

> suits *as herein authorized* may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes

> of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other *suits hereunder* shall be brought within two years after the cause of action arises.[11]

Section 9 permits the arbitration, compromise, or settlement of any claim "in which suit will lie under the provisions of sections 2, 4, 7, and 10 of this Act." Manifestly, in Section 9 Congress drew no distinction between suits under Section 2 and suits under Section 4. Again, Section 12 directs the Attorney General to report to each session of Congress "the suits under this Act" in which final judgment is rendered, a provision which includes suits in which the United States assumed liability as authorized in Section 4. Plainly, therefore, Congress considered a suit like the instant case in which the United States invoked the provisions of Section 4 to be a suit

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[11] Italics added. The section was subsequently amended by Act of June 30, 1932, which added a saving clause temporarily extending the time limitation as to certain causes of action where suits in admiralty or actions at law or in the Court of Claims had been commenced prior to January 6, 1930 (date of the decision in *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320) upon the plaintiffs' mistaken assumption that the remedy provided by the Suits in Admiralty Act was not exclusive. 47 Stat. 420. See H. Rep. 1012, 77th Cong., 1st Sess. The 1932 amendment preserved intact the body of the section as originally enacted. The matter added by the amendment has spent its effect. See Appendix, *infra*, pp. 38–39.

"under this Act". And if reliance is to be placed on the words alone it must be concluded that in Section 5 of the Act Congress included such suits in the broad term "all other suits hereunder" [*i. e.*, other than suits on causes of action arising prior to the effective date of the Act].

Broader considerations dictate the same conclusion. Section 5 is a vital substantive provision of the Act, "setting a limit to the existence of the obligation which the Act creates." *Engel* v. *Davenport*, 271 U. S. 33, 38. "The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded * * *." *The Harrisburg*, 119 U. S. 199, 214; quoted with approval in *Western Fuel Company* v. *Garcia*, 257 U. S. 233, 243; accord: *Atlantic Coast Line Railroad* v. *Burnette*, 239 U. S. 199; *Steadfast*, 1930 A. M. C. 245 (applying Section 5 of the Suits in Admiralty Act). In view of the substantive nature of the provision Congress cannot have intended Section 5 to be excluded from the broad direction in Section 4 that after the United States has filed a suggestion of interest the "cause shall proceed against the United States in accordance with the provisions of this Act."

The purpose of the Act, moreover, forbids making any such exclusion. It aimed to establish a uniform remedy. *Fleet Corp.* v. *Rosenberg Bros.*, 276 U. S. 202, 213. And "The period of time within which an action may be commenced is a material element in such uniformity of operation" (*Engel* v. *Davenport*, 271 U. S. 33, 39). If Section 5 does not apply to libels *in rem* such as petitioner asserts, there will be great and anomalous diversities. Thus, so long as the Government retained ownership, the period of limitations would be two years, for Section 5 would apply. Likewise, it would seem that Section 5 would also apply if the transfer were made to private ownership after the end of the two-year period, for there is no reason to assume that Congress intended to revive the liability. Revival of the liability would diminish the purchase price available to the Government (See p. 17; *supra*) even after all remedy against it were barred. But (petitioner argues) if the transfer is made before two years elapse after the collision, the cause of action will be barred only when it is proper to invoke the indefinite doctrine of laches.[12] A capri-

[12] That the timeliness of proceedings for the enforcement of maritime liens is ordinarily a question of laches, rather than of the applicability of limitation statutes, see *The Key City*, 14 Wall. 653; *The Everosa*, 93 F. (2d) 732 (C. C. A. 1); *The Gertrude*, 38 F. (2d) 946 (C. C. A. 5); *The Owyhee*, 66 F. (2d) 399 (C. C. A. 2); Robinson, *Handbook of Admiralty Law in the United States* (1939), § 55. *The Key*

cious intention to make the length of the period of limitation of a liability which ultimately will rest on the Government depend upon the adventitious circumstance of whether a sale occurs, and if so whether, before or after two years have elapsed, cannot be imputed to a Congress which was seeking uniformity; yet that is the necessary effect of petitioner's interpretation.

Furthermore, the House debate shows affirmatively that Congress specifically intended to place suits under Section 2 and suits under Section 4 upon the same basis and to limit the liability of the United States in each instance to suits brought within the two-year period. The following colloquy occurred among three members of the Committee on the Judiciary, [13] which reported the bill (59 Cong. Rec. 1756):

City stated the proposition as follows: "2. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case." (14 Wall. at 660.) However, analogous local statutes of limitation, which of course are highly variable, are often considered in determining what constitutes laches. *Hughes* v. *Roosevelt*, 107 F. (2d) 901, 903 (C. C. A. 2); *Marshall* v. *International Mercantile Marine Co.*, 39 F. (2d) 551 (C. C. A. 2); *The Kermit*, 76 F. (2d) 363, 366-367 (C. C. A. 9); *McGrath* v. *Panama R. Co.*, 298 Fed. 303 (C. C. A. 5); 3 Benedict, *Admiralty* (6th ed., 1940), § 463.

[13] 58 Cong. Rec. 10; H. Rep. 497, 66th Cong., 2d sess.; Hearing before the Committee on the Judiciary, House of Representatives, 66th Cong., 1st sess., on H. R. 7124.

Mr. WALSH. Mr. Chairman, I move to strike out the last word.

This section 4 is the one that relates to vessels which have previously been operated by the United States and have since passed into private ownership. Do I understand that it is the intention now, if suit is to be brought *within two years* after a collision occurs for damages which resulted while the vessel was being operated by the United States, but after she is returned to private ownership, that the United States steps in and furnishes this stipulation and assumes the liability for the satisfaction of the decree and releases her from arrest, and so forth, just as if the United States still owned the vessel?

MR. VOLSTEAD. It is my understanding, and I presume that would save some money, instead of having the vessel tied up, with the costs incident thereto. I do not see any great necessity——

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Mr. HUSTED. The United States, it seems to me, would be in *exactly the same situation* as to causes of action which arose after the United States Government parted with the possession of the ships as she would be in reference to causes of action that arose while she was in possession of the ships. [Italics added.]

To achieve the uniformity intended by Congress the Court has held "that the remedies given

by the Act are exclusive in all cases where a libel might be filed under it." *Johnson* v. *United States Shipping Board Emergency Fleet Corporation* 280 U. S. 320, 327. Petitioner might have filed a libel against the United States under the Act, subject to the two-year period of limitations (*Fleet Corp.* v. *Rosenberg Bros.*, 276 U. S. 202) so that if the present libel *in rem* can be maintained it is as an exception to the general rule depending upon a statutory waiver of immunity. Such an exception to the general rule announced in the *Johnson* case should be strictly construed, particularly since it is a waiver of sovereign immunity,[14] regardless of its statutory basis; for it must be assumed that Congress intended the general rule to be applied so far as possible. Such harmony is best achieved by construing the provisions of the Act to be applicable to the suits *in rem* wherever the language permits; as we have shown above, the language not only permits but requires that result in determining the applicability of Section 5.[15]

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[14] *United States* v. *Michel*, 282 U. S. 656; *United States* v. *Sherwood*, 312 U. S. 584, 589–592.

[15] In *The Caddo*, 285 Fed. 643 (S. D. N. Y.), and *The Bascobal*, 295 Fed. 299 (C. C. A. 5), upon which petitioner places its chief reliance, the liens sustained beyond the time prescribed in Section 5 arose prior to March 9, 1920, the date of the Act's passage. Hence on their facts these cases are not necessarily in conflict with the decision below in the instant case, since it may be argued that the statute was not

We have discussed in Point I our reasons for believing that Government vessels are not liable *in rem* for their torts. In this Point II we so far have assumed *arguendo* that lien liability existed without attributing it to any particular statute. But in fact, it would seem plain that the assumption cannot be maintained under the principle of exclusiveness announced in the *Johnson* case unless the waiver of immunity is based upon Section 4 of the Suits in Admiralty Act. In that event the suit indisputably arises under the Suits in Admiralty Act and is controlled by the time limitation of Section 5.

Moreover, if Section 4 be construed as a consent to lien liability enforcible after a transfer of the vessel, it should be construed to give such consent only when the suit is brought within the two-year period specified by Section 5. Section 4 was intended to improve the marketability of Government vessels by a speedy method for procuring their release from attachment upon liens attaching prior to the transfer. In effect, Section 4

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intended to affect liens which had previously accrued under Section 9 of the Shipping Act of 1916. *Cf. United States v. St. Louis, San Francisco & Texas Railway Company*, 270 U. S. 1; *United States* v. *Magnolia Petroleum Company*, 276 U. S. 160, 162–163; *The Edna*, 185 Fed. 206, 207 (S. D. Ala.); 59 Cong. Rec. 1685. *But cf.* Hearing before the Committee on the Judiciary, House of Representatives, 66th Cong., 1st sess., on the Attorney General's Substitute for S. 3076 and H. R. 7124, pp. 9, 19–20.

simply provides a means for instituting suit against the United States where the vessel has been transferred, for to make its vessels marketable the United States must proceed under Section 4 to obtain the prompt release of vessels which it has transferred. Section 5 was intended to set at rest all liabilities of the United States unasserted for two years. Both purposes can be fulfilled only if the consent to lien liability in Section 4, which is granted as a means of instituting suit against the United States, is subject to the time limitation of Section 5 just as the consent to *in personam* liability granted in Section 2.

The logic of our position is made pointed by current conditions. During the present war, and during the preceding emergency period, the Government has been acquiring by construction, purchase and requisition hundreds of merchant vessels and will continue to do so. Unless the applicability to the present case of the two-year period of limitations is established, chaos may result when the Government restores or sells the vessels to private owners. If the vessels, in private hands, may be subjected to *in rem* suits on causes of action accrued during Government ownership, operation or possession, after the expiration of the right to sue the United States *in personam*, there will be a continuing cloud on title to the vessels.

CONCLUSION

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be affirmed.

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NOVEMBER 1942.

APPENDIX A

Section 9 of the Shipping Act of 1916, c. 451, 39 Stat. 728, 730, provided as follows:

> That any vessel purchased, chartered, or leased from the board may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided,* That foreign-built vessels admitted to American registry or enrollment and license under this Act, and vessels owned, chartered, or leased by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered to any person a citizen of the United States, as provided in this Act, may engage in the coastwise trade of the United States.
>
> Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. No such vessel, without the approval of the board, shall be transferred to a foreign registry or flag, or sold; nor, except under regulations prescribed by the board, be chartered or leased.

When the United States is at war, or during any national emergency the existence of which is declared by proclamation of the President, no vessel registered or enrolled and licensed under the laws of the United States shall, without the approval of the board, be sold, leased, or chartered to any person not a citizen of the United States, or transferred to a foreign registry or flag. No vessel registered or enrolled and licensed under the laws of the United States, or owned by any person a citizen of the United States, except one which the board is prohibited from purchasing, shall be sold to any person not a citizen of the United States or transferred to a foreign registry or flag, unless such vessel is first tendered to the board at the price in good faith offered by others, or, if no such offer, at a fair price to be determined in the manner provided in section ten.

Any vessel sold, chartered, leased, transferred, or operated in violation of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than $5,000 or to imprisonment of not more than five years, or both such fine and imprisonment.

Section 18 of the Merchant Marine Act of 1920, c. 250, 41 Stat. 988, 994 (46 U. S. C. § 808), provided as follows:

That section 9 of the "Shipping Act, 1916," is amended to read as follows:

"SEC. 9. That any vessel purchased, chartered, or leased from the board, by

persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided*, That foreign-built vessels admitted to American registry or enrollment and license under this Act, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the board to any person a citizen of the United States, as provided in this Act, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

"It shall be unlawful to sell, transfer or mortgage, or, except under regulations prescribed by the board, to charter, any vessel purchased from the board or documented under the laws of the United States to any person not a citizen of the United States, or to put the same under a foreign registry or flag, without first obtaining the board's approval.

"Any vessel chartered, sold, transferred or mortgaged to a person not a citizen of the United States or placed under a for-

eign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than $5,000, or to imprisonment for not more than five years, or both."[1]

The Suits in Admiralty Act of 1920, c. 95, §§ 1–13 inclusive, 41 Stat. 525–528 (46 U. S. C. §§ 741–752), provided as follows:

CHAP. 95. An Act Authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the

[1] Pursuant to Section 904 of the Merchant Marine Act, 1936, 49 Stat. 2016, this section now reads: "United States Maritime Commission" or "Commission," in lieu of "United States Shipping Board" or "Board," and so appears at 46 U. S. C. § 808.

United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

SEC. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.

SEC. 4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act.

SEC. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises: [*Provided further*, That the limitations in this section contained for the commencement of suits hereunder shall not bar any suit against the United States or the United States Shipping Board Merchant Fleet Corporation, formerly known as the United States Shipping Board Emergency Fleet Corporation, brought hereunder on or before December 31, 1932, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law or an action under the Tucker Act of March 3, 1887, (24 Stat. 505; U. S. C., title 28, sec. 250, subdiv. 1), was commenced prior to January 6, 1930,

and was or may hereafter be dismissed because not commenced within the time or in the manner prescribed in this Act, or otherwise not commenced or prosecuted in accordance with its provisions: *Provided further,* That such prior suit must have been commenced within the statutory period of limitation for common-law actions against the United States cognizable in the Court of Claims: *Provided further,* That there shall not be revived hereby any suit at law, in admiralty, or under the Tucker Act heretofore or hereafter dismissed for lack of prosecution after filing of suit: *And provided further,* That no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized hereunder.] [2]

SEC. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

SEC. 7. That if any vessel or cargo within the purview of sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of

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[2] As noted in the text *supra*, p. 22, Section 5 is carried in the United States Code as follows: "Suits as authorized in this chapter shall be brought within two years after the cause of action arises." 46 U. S. C., § 745. The matter in brackets was added by Act of June 30, 1932, c. 315, 47 Stat. 420.

any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the cer-

tificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: *Provided, however,* That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case.

SEC. 8. That any final judgment rendered in any suit herein authorized, and any final judgment within the purview of sections 4 and 7 of this Act, and any arbitration award or settlement had and agreed to under the provisions of section 9 of this Act, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement.

SEC. 9. That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of sections 2, 4, 7, and 10 of this Act.

SEC. 10. That the United States, and the crew of any merchant vessel owned or operated by the United States, or such cor-

poration, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such corporation, having control of the possession or operation of such vessel.

SEC. 11. That all moneys recovered in any suit brought by the United States on any cause of action arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage, or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such aforesaid corporation, having control of the vessel or cargo with respect to which such cause of action arises, for reimbursement of the appropriation, or insurance fund, or other funds, from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid.

SEC. 12. That the Attorney General shall report to the Congress at each session thereof the suits under this Act in which final judgment shall have been rendered for or against the United States and such aforesaid corporation, and the Secretary of any department of the Government of the United States, and the United States Shipping Board, and the board of trustees of any such aforesaid corporation, shall likewise report the arbitration awards or

settlements of claims which shall have been agreed to since the previous session, and in which the time to appeal shall have expired or have been waived.

SEC. 13. That the provisions of all other Acts inconsistent herewith are hereby repealed.[1]

Approved, March 9, 1920.

[1] This provision does not appear in the United States Code.

APPENDIX B

The draftsman of the Suits in Admiralty Act testified concerning Section 4 (then Section 5) in the Hearing before the Senate Committee on Commerce, 66th Cong., 1st Sess., on S. 2253 as follows (pp. 17–18):

> Now, let me speak about section 5 before I read it. That is designed to meet this situation with which we are actually confronted today. The Shipping Board requisitioned the use of a large number of vessels. In some cases it operated those vessels under what is known as the time form of requisition charter party. Under that form the owner manned and operated the vessel and the Shipping Board had the use of the cargo space of the vessel and furnished the bunkers. In other cases we operated the vessel under bare boat form. There the Shipping Board or the Navy or War Departments took over the bare ship, manned it with its own crews, supplied and furnished it, and operated it as if it owned the vessel. Under the time form the United States assumed the war risk upon the vessel, but the owner of the vessel, being in control of her navigation, carried the marine risk. Under the bare boat form we assumed both the war risk and the marine risk.
>
> The Supreme Court has held, I think in the case of *The Siren*, that while you cannot libel a vessel in the possession of the United States for a maritime lien, nevertheless the maritime lien does arise from a

maritime casuality (*sic*), we will say, while the possession of the vessel is in the United States, but is unenforceable. The result of that decision is this: We will take an actual case that we have before us in the Department of Justice. The steamer *Frank H. Buck,* belonging to the Associated Oil Co. of California, was requisitioned by the Shipping Board under a bare boat form of charter and was turned over to the Navy Department for use as an oil tanker. While in that service she was in collision with a Standard Oil tanker, that, I believe, was under requisition by the Navy Department, but under a time form of charter party. The United States was carrying the marine risk on the *Buck,* but the owner of The Standard Oil Co. tanker was carrying the marine risk on that vessel. While the *Buck* was in the possession of the United States she could not be libeled by the Standard Oil Co., but the moment that the Shipping Board or the Navy Department delivered the *Buck* back to the Associated Oil Co. the right to enforce the lien which had arisen through the collision operation became existent, and the Standard Oil Co. libeled the *Buck* at Los Angeles. That is an illustration of the difficulty we have had. The Navy Department is liable under its arrangement with the Shipping Board for the collision damages. The contract between the Associated Oil Co. and the Government is between the Associated Oil Co. and the Shipping Board. The Navy Department said, "We have not any authority to give any bond to take care of that litigation." The Shipping Board said, "Well, it is your liability and not ours, and you are the people who should

put up the security." The result was that the owner, the Associated Oil Co., to release its vessel obtained a surety bond from a surety company, and will probably contest the suit, and then under its requisition charter party with the Shipping Board will ask the latter to perform its contract by paying not only the judgment for the collision damages but also the costs of the suit, including the premium on the bond.

This section is designed to meet that situation * * *. [Emphasis supplied.]

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P. 2

SUPREME COURT OF THE UNITED STATES.

No. 265.—October Term, 1942.

Clyde-Mallory Line, Petitioner, *vs.* Steamship Eglantine and the United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 4, 1943.]

Mr. Justice Black delivered the opinion of the Court.

The question in this case is whether the libel in rem brought by the petitioner against the Steamship Eglantine is barred by Sec. 5 of the Suits in Admiralty Act, 41 Stat. 525, which provides that "suits hereunder shall be brought within two years after the cause of action arises."

On December 21, 1932, while the Eglantine was being operated by the United States as a merchant vessel, it collided with the Steamship Brazos, owned by the petitioner. Four and one-half years later, after the government had sold the Eglantine to a private operator, the petitioner filed this libel in rem against the vessel and the marshal took it from the private owner under an admiralty warrant of attachment. Admiralty imposes a lien upon privately owned vessels for damages inflicted by negligent operation and provides for enforcement by proceedings against the vessels themselves.[1] In Sec. 9 of the Shipping Act of 1916, 39 Stat. 728, Congress permitted enforcement of such liens against government merchant vessels by providing that they should be "subject to all laws, regulations and liabilities governing merchant vessels" generally. The Shipping Act contained no limitation of time within which such actions must be commenced, but left that question to be decided in accordance with the general rules of laches under admiralty practice.[2] This clause was carried forward and became a part of Sec. 18 of the Merchant Marine Act of 1920. 46 U. S. C. § 808.

It is the petitioner's contention that this action in rem was authorized and controlled by Sec. 9 as amended. The government

[1] The John G. Stevens, 170 U. S. 113, 120.

[2] The Key City, 14 Wall. 653.

contends that the Suits in Admiralty Act withdrew the previous 1916 congressional consent to impose and enforce liens against vessels for injuries inflicted by government operation whether the vessels are in its possession or that of its purchasers. In addition, the government asserts that this proceeding is one under and controlled by Sec. 5 of the Suits in Admiralty Act and therefore barred because brought more than two years after the collision. The District Court ruled against the government on both these defenses under authority of *The Bascobal*, 295 F. 299. But the Circuit Court of Appeals declined to follow its former ruling in *The Bascobal*, held Sec. 5 applicable, and accordingly reversed. 127 F. 2d 569. We granted certiorari because the questions raised are important in the construction of the Suits in Admiralty Act and are in some doubt. Cf. *The Caldo*, 285 F. 643. We think the limitations of Sec. 5 of the Suits in Admiralty Act are controlling, and for that reason we find it unnecessary to consider the other defense set up by the government.

In *The Lake Monroe*, 250 U. S. 246, this Court decided that Sec. 9 of the Shipping Act of 1916 did make government merchant vessels subject to seizure under in rem proceedings. This decision however prompted Congress shortly thereafter to review and reconsider the effect of the broad powers Sec. 9 had granted.[3] The result of this review was passage of the Suits in Admiralty Act in which Congress expressly withdrew its previous consent to have its vessels subject to the laws applicable to merchant ships generally. Sec. 1 provided for their immunity from arrest or seizure by judicial process in the United States or its possessions; Sec. 2 authorized libels in personam directly against the United States for injuries inflicted by its governmental ship operations. But Congress went beyond the cases of liability for ships in the possession of the United States and made careful provision in Sec. 4 for a manner of determining governmental liability for maritime torts occurring during the period of government ownership should government vessels be transferred to private owners before suit was brought. That Section gave the government the privilege, of which it availed itself in this case, to appear as a party-defendant and assume liability, and expressly prescribed that "thereafter such cause shall proceed against the United States in accordance with the provisions of this Act." Immediately sub-

[3] Blamberg Bros. v. United States, 260 U. S. 452, 458.

sequent is the "provision of this Act" here in question: "Suits hereunder shall be brought within two years." This is as surely a provision of the Act in accordance with which the cases must be governed as is any other clause. The Suits in Admiralty Act thus prescribes a comprehensive procedural pattern designed fully to control the method by and the time within which obligations for damages inflicted by government operation of ships must be instituted and determined.

There is no question that under the Suits in Admiralty Act suits against the government for maritime torts committed by its vessels, when brought while the vessels are still in the possession of the government, are subject to the two-year limitation provision. Sec. 4 provides so closely related a method of permitting the government to meet its obligations on a maritime tort with economy and dispatch that we should be slow to construe any ambiguity in the statute to establish a separate and distinct period of limitation for it. The conclusion is inescapable that there is no practical difference between suits against the government as owner of the vessel and against the government as the party in interest when it voluntarily appears to defend its lately sold property against tort liability.

As has been noted, Sec. 9 of the 1916 Act was incorporated in the 1920 Merchant Marine Act, passed three months after the Suits in Admiralty Act. It has been suggested, although not vigorously pressed, that even if the Suits in Admiralty Act was intended to bar actions such as this, it was modified by re-enactment of Sec. 9. Congress did not, however, in passing the Merchant Marine Act, as it did in passage of the Suits in Admiralty Act, have its attention focused on this particular problem. Running through the Merchant Marine Act there appears repeated manifestation of a congressional purpose to expedite transfer of government vessels into private hands,[4] a purpose clearly compatible with the Suits in Admiralty Act which through its limitation provisions cut off lingering liens. There is nothing whatever in the 1920 Merchant Marine Act, nor, so far as has been pointed out to us, anything in its legislative history, indicating that Congress intended to repeal, alter, or amend the Suits in Admiralty Act in whole or in part. The 1920 re-enactment is not meaningless; it retains in the law that portion of the 1916 statute unaffected by

[4] 41 Stat. 988, §§-1, 5, 6, 7, 12, 19.

the Suits in Admiralty Act. It remains an expression of the basic policy of waiver of immunity by the government for maritime torts of the sort within its scope.

We hold that when the government voluntarily appears in an action authorized by Sec. 4 of the Suits in Admiralty Act, the proceedings are governed by Sec. 5 with its limitation provisions.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.